Supreme Court, U.S.
FILED
MAR 13 1996
OFFICE OF THE CLERK

No. 95-1470

In The Supreme Court of the United States

October Term, 1995

Central States, Southeast and Southwest Areas Pension Fund,
Petitioner,

v.

The Sherwin-Williams Company,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

Thomas C. Nyhan *
General Counsel
Terence G. Craig
James P. Condon
Central States, Southeast and Southwest Areas Pension Fund
9377 West Higgins Road
Rosemont, Illinois 60018-4938
(847) 518-9800

* Counsel of Record

Wilson - Epes Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

96 PP

QUESTIONS PRESENTED

Sherwin-Williams and its two subsidiaries, Dupli-Color and Lyons were a group of trades or businesses under common control and thus, under ERISA § 1301(b)(1), were deemed a single employer for the purpose of determining pension withdrawal liability. Sherwin-Williams sold Lyons, which almost immediately went bankrupt and ceased contributing to Central States Pension Fund. Central States assessed Sherwin-Williams for withdrawal liability, pursuant to 29 U.S.C. § 1381, due to Lyons cessation of contributions and due to the fact that the group of trades or businesses comprising the employer had upon the sale of Lyons ceased to exist.

The question presented is—

Whether the sale the stock of a corporation that is a member of a group of trades or businesses under common control (a "control group") comprising an ERISA employer constitutes a withdrawal of that employer from the multiemployer pension plan to which the sold corporation contributed unless exempted by 29 U.S.C. § 1398?

This question has two components—

1. Whether a group of trades or businesses comprising an ERISA employer before the sale of one of its components that contributes to a multiemployer pension plan is, after the sale, the same ERISA employer—although now comprised of a different (smaller) group of trades or businesses?

2. Whether 29 U.S.C. § 1398 applies in the event of a sale of a corporation's stock to exempt from withdrawal an ERISA employer that satisfies the requirements of § 1398?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF REASONS FOR GRANTING THE WRIT	4
REASONS FOR GRANTING THE WRIT	6
I. INTRODUCTION TO ERISA CONTROL GROUP (EMPLOYER): DISSOLUTION, LIABILITY AND SUCCESSORSHIP	6
II. THE DECISION OF THE COURT BELOW HAS MADE ERISA UNWORKABLE IN ONE OF THE STATUTE'S MOST FUNDAMENTAL ASPECTS	10
III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *CHEVRON v. NRDC*	15
IV. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE THIRD, SIXTH AND NINTH CIRCUITS	18
CONCLUSION	22

TABLE OF AUTHORITIES

CASES Page

Bowers v. Andrew Weir Shipping, 27 F.3d 800 (2nd Cir. 1994) 17, 19
Chevron, USA v. NRDC, 467 U.S. 837 (1984) 5, 15, 16, 18, 20, 22
Dorns Transportation v. Teamsters Pension Trust Fund, 787 F.2d 897 (3rd Cir. 1986) 8, 21
Elliott v. Carpenters' Pension Trust Fund, 859 F.2d 808 (9th Cir. 1988), *cert. denied*, 490 U.S. 1036 (1989) 19
Mead v. Tilley, 490 U.S. 714, 109 S.Ct. 2156, 104 L.Ed.2d 796 (1989) 16
Penn Central Corp. v. Western Conference of Teamsters Pension Trust Fund, 75 F.3d 529 (9th Cir. 1996) 8, 19
Pension Benefit Guaranty Corporation v. LTV, 496 U.S. 633 (1990) 5, 16, 18, 20
Pension Benefit Guaranty Corporation v. Ouimet Corp., 630 F.2d 4 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981) 7
Pension Benefit Guaranty Corporation v. R.A. Gray, 104 S.Ct. 2709 (1984) 10
Teamsters Pension Trust Fund v. Central Michigan Trucking, 857 F.2d 1107 (6th Cir. 1988) 8, 20
United Food and Commercial Workers Union v. Progressive Supermarkets, 664 F. Supp. 633 (D. N.J. 1986) 20
United Steelworkers v. Harris & Sons Steel Co., 706 F.2d 1289 (3rd Cir. 1993) 20

STATUTES AND REGULATIONS

26 U.S.C. § 1563 ..... 6, 12, 13
26 U.S.C. § 414(b) 6, 13
26 U.S.C. § 414(c) 2, 6, 12, 13
28 U.S.C. § 1251(1) 2
29 U.S.C. § 1301 ..... 2, 21
29 U.S.C. § 1301(a)(14) 6
29 U.S.C. § 1301(a)(3) 3

TABLE OF AUTHORITIES—Continued

	Page
29 U.S.C. § 1301(b)(1)	3, 4, 6, 12, 13, 20
29 U.S.C. § 1362(d)	8
29 U.S.C. § 1369(b)	2, 8
29 U.S.C. § 1381	i
29 U.S.C. § 1383	3
29 U.S.C. § 1384	17, 18
29 U.S.C. § 1385(a)(1)	7
29 U.S.C. § 1398	*passim*
29 U.S.C. § 1398(1)	2
29 U.S.C. § 1401	4
29 U.S.C. §§ 1381-1405	10
26 C.F.R. 1.414(b)-1	12
26 C.F.R. 1.414(c)-1	6, 12, 13
26 C.F.R. 1.414(c)-2	12
26 C.F.R. 1.1563	12, 21
26 C.F.R. 1.1563-1	12

OTHER AUTHORITIES

Multiemployer Pension Plan Amendments Act of 1980, Report of the Committee on Ways and Means, U.S. House of Representatives, H.R. Rept. 96-869 (II) 96th Cong., 2nd Sess. (1980), [1980] U.S. Code Cong. & Admin. News 2993	14, 18
PBGC Op. Ltr. 82-4	8, 16
PBGC Op. Ltr. 82-17	17
PBGC Op. Ltr. 82-40	17
PBGC Op. Ltr. 83-11	16
PBGC Op. Ltr. 84-7	16
PBGC Op. Ltr. 92-1	9, 15, 16, 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,
Petitioner,

v.

THE SHERWIN-WILLIAMS COMPANY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the court below is reported at 71 F.3d 1338 and is reproduced in Appendix A, pp. 1a-11a. The decision of the district court is reported at 879 F.Supp. 867 and is reproduced in Appendix B, pp. 12a-32a. The decision of the arbitrator in Case No. 51-621-0009-91 (American Arbitration Association, Chicago Regional Office) (Sept. 12, 1994) is reproduced in Appendix C, pp. 33a-44a.

JURISDICTION

The judgment of the court below was entered on December 14, 1995. Jurisdiction of this court is invoked under 28 U.S.C. § 1251(1).

STATUTES INVOLVED

29 U.S.C. § 1301

> (b)(1) An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of Title 26. For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of Treasury under section 414(c) of Title 26.

29 U.S.C. § 1398(1)

> Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because—
>
> (1) an employer ceases to exist by reason of—
>
> (A) a change in corporate structure described in section 1369(b) of this title, or
>
> (B) a change to an unincorporated form of business enterprise,
>
> if the change causes no interruption in employer contributions or obligations to contribute under the plan. . . .
>
> * * * *

For purposes of this part, a successor or parent corporation or other entity resulting from any such change shall be considered the original employer.

STATEMENT OF THE CASE

Central States, Southeast and Southwest Areas Pension Fund ("Central States") is a multiemployer pension plan within the meaning of 29 U.S.C. § 1301(a)(3). The Sherwin-Williams Company ("Sherwin-Williams") owned, until 1990, two companies that contributed to Central States on behalf of certain of their employees. One of the companies, Dupli-Color, is still owned by Sherwin-Williams and still contributes to Central States. The other company, Lyons Transportation Lines, Inc. ("Lyons") also contributed to Central States for a time. Sherwin-Williams purchased Lyons in 1987 and on May 31, 1990, sold its stock. Until Lyons was sold, these three companies constituted a group of trades or businesses under common control within the meaning of 29 U.S.C. § 1301(b)(1). This group was, under § 1301 (b)(1), the ERISA employer. In October 1990, Lyons went bankrupt and ceased contributing to Central States. Central States assessed Sherwin-Williams for $1,764,339.15 in withdrawal liability. In arriving at this assessment Central States determined that the sale of Lyons had caused the cessation of Lyons contributions.[1] Therefore the withdrawal liability exemption of 29 U.S.C. § 1398 did not apply. Since the sale of Lyons had broken up the ERISA employer, a withdrawal of that employer occurred under 29 U.S.C. § 1383 for which Sherwin-Williams was liable.

Sherwin-Williams disputed Central States' assessment and demanded arbitration, as it was required to do by

[1] For purposes of its decision the court below assumed, as it must, that the sale of Lyons caused the interruption in contributions to Central States. Decision below (hereinafter App. A) at 6a. The legal rulings below obviated the need for an express factual finding on this point, which therefore remains for a later ruling by an arbitrator.

29 U.S.C. § 1401. The arbitrator ruled that if the sale of Lyons caused the interruption of contributions to Central States, then under § 1398 the Sherwin-Williams group should be deemed intact (as if Lyons had not been sold). But since Dupli-Color still contributed, a withdrawal could not have occurred and the Central States' assessment was erroneous.

Central States appealed to the United States District Court for the Northern District of Illinois. The district court ruled that the arbitrator's reasoning was flawed (the group should not be deemed intact). The court nonetheless affirmed the arbitrator on other grounds. To the district court the old group simply never ceased contributing because of Dupli-Color's continuing contributions.

Central States appealed to the United States Court of Appeals for the Seventh Circuit. The court below ruled that neither the arbitrator nor the district court directly confronted Central States central argument that the original employer had ceased to exist (hence had withdrawn) when Sherwin-Williams sold Lyons. The court below ruled that the original employer survived the sale of one of its components therefore could not withdraw on that account. Further, it ruled that 29 U.S.C. § 1398 did not contradict this ruling because that statute did not apply to a sale of stock as occurred here. The district court was affirmed on this ground.

SUMMARY OF REASONS FOR GRANTING THE WRIT

Sherwin-Williams and its wholly-owned subsidiaries Lyons and Dupli-Color were a group of trades or businesses under common control within the meaning of 29 U.S.C. § 1301(b)(1). Lyons and Dupli-Color were contributors to Central States. Lyons was sold and shortly afterwards went bankrupt and ceased contributing to Central States. Under 29 U.S.C. § 1398 a change in corporate structure does not constitute a withdrawal from

a pension plan unless it causes an interruption of contributions to the plan. Because Lyons ceased contributing, Central States assessed Sherwin-Williams for withdrawal liability.

The court below ruled that Sherwin-Williams did not withdraw and was not liable to Central States because the Sherwin-Williams group continued to exist and continued to contribute. Section 1398, it held, did not apply to a sale of stock like this, and thus did not imply a dissolution of the original employer as Central States had argued. In arriving at this conclusion, the court below rejected the contrary views of the Pension Benefit Guaranty Corporation, the agency charged with oversight of the statute. This lack of deference to the government agency conflicts with this court's decision in *Chevron, USA v. NRDC*, 467 U.S. 837 (1984), which requires such deference, and with *Pension Benefit Guaranty Corporation v. LTV*, 496 U.S. 633 (1990), which requires particular deference to the PBGC's interpretation of Title IV of ERISA. Further, the decision of the court below conflicts directly with decisions of the Third, Sixth, and Ninth Circuits. These circuits have each held that § 1398 does apply to sales of stock specifically because a sale of stock does destroy the original employer, which leads to withdrawal liability unless the statutory exemption applies.

The three circuits with whom the court below disagrees had been following 15 years of settled law. The term "employer" is the most fundamental of ERISA terms. The court below referred, however, to inapplicable tax regulations in deciding that employer means something other than what the agency and other courts had thought. Moreover, the court misunderstood even those regulations. Under the appropriate ERISA regulations, a group of trades or businesses under common control is a single employer. The employer is unique to its make up. If the make up changes through a sale of stock, the employer is dissolved. By ruling that an ERISA employer main-

tains its identity after the sale of one of its components, the court below has attacked ERISA at its foundation. If there is no agreement on this most basic of terms, then the statute is unworkable. Multiemployer pension plans and their contributing employers transcend circuit boundaries. If different law applies to the same transaction, then these plans cannot effectively administer the statute.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION TO ERISA CONTROL GROUP (EMPLOYER): DISSOLUTION, LIABILITY AND SUCCESSORSHIP.

Under Title IV of ERISA trades or businesses under common control constitute a single employer. 29 U.S.C. § 1301(b)(1). Thus, a parent corporation and its wholly-owned subsidiary would constitute one employer with respect to a pension plan whether one or both of them were obligated to contribute to the pension plan. The same is true of a so-called "brother-sister" group of corporations whose common control is established by common ownership of their stock (by five or fewer individuals).[2] This "control group" rule has profound implications under Title IV.[3] Most common, it pierces the corporate veil for certain ERISA liabilities because where the statute makes the "employer" liable, it necessarily makes each component of the control group liable even

---

[2] Rules relating to trades or businesses under common control for purposes of ERISA are found at 26 C.F.R. 1.414(c). These rules also apply to unincorporated businesses in similar fashion, but that will not be important here.

[3] The term "control group" will be used here to mean a group of trades or businesses under common control within the meaning of ERISA 29 U.S.C. § 1301(b) and 26 U.S.C. § 414(c) and regulations thereunder. This is to distinguish the term from a similar but distinct term "controlled group," which is used in 26 U.S.C. § 1563 for tax purposes and is also sometimes used in ERISA (29 U.S.C. § 1301(a)(14) and 26 U.S.C. § 414(b)). The terms "control group" and "employer" will be used interchangeably herein.

though some of the components, standing alone, would not be liable due to the usual liability limitations of the corporate form. Some examples will illustrate:

Assume parent company P owns all of subsidiary company S, which contributes to a multiemployer pension plan. Control group P-S is the ERISA employer. Now if S ceases contributions, then employer P-S will have completely withdrawn from the pension plan because no more contributions are being generated by the employer. Employer P-S will therefore incur withdrawal liability to the pension plan. Since employer P-S is not in fact a single entity, however, the pension plan will collect the liability from P and from S, who as components of the employer are jointly and severally liability for the liability of employer P-S. *See Pension Benefit Guaranty Corporation v. Ouimet Corp.*, 630 F.2d 4, 11 (1st Cir. 1980), *cert. denied*, 450 U.S. 914 (1981).

The control group rule can also protect an employer from liability. For example, if both P and S contribute to the pension plan, the cessation of contributions by S does not constitute a cessation by employer P-S because P continues to contribute. Both P and S are shielded from withdrawal liability because employer P-S has not withdrawn.[4]

Next suppose that P, a non-contributor, sells the stock of S, which continues to contribute to the pension plan. Control group P-S ceases to exist and the two components go their separate ways. But if control group P-S ceases to exist, so has employer P-S, which must, therefore, have withdrawn from the pension plan. S is now employer S, a new employer under the pension plan. P and S would be liable for withdrawal liability unless saved by another statutory provision, which they are.

---

[4] If the company that ceases contributions made more than 70% of the control group's contributions, its cessation might constitute a partial withdrawal of the control group employer under 1385(a)(1) for which the companies would share partial withdrawal liability.

In 29 U.S.C. § 1398 Congress provided that an employer like P-S does *not* withdraw from a pension plan "solely because" of certain "changes in corporate structure" described in 29 U.S.C. § 1369(b). Section 1369(b) provides that if an employer ceases to exist by reason of a merger, consolidation, or division, the successor corporation or corporations shall be treated as the employer to which these rules apply.[5] Read together these provisions mean that a withdrawal does not occur when P sells S (thus dividing employer P-S) provided that the conditions of § 1398 are met.[6]

The workings of the statute described above has been the settled interpretation of the courts and the agency that administers ERISA, the Pension Benefit Guaranty Corporation ("PBGC"), for over 15 years. PBGC Opinion Letter 82-4 (Feb. 10, 1982) (App. D at 45a); *Dorns Transportation v. Teamsters Pension Trust Fund*, 787 F.2d 897 (3rd Cir. 1986); *Teamsters Pension Trust Fund v. Central Michigan Trucking*, 857 F.2d 1107 (6th Cir. 1988); *Penn Central Corp. v. Western Conference of Teamsters Pension Trust Fund*, 75 F.3d 529 (9th Cir. 1996). The court below has now decided, however, that this conventional view of the statute is wrong. According to the Seventh Circuit § 1398 simply does not apply to sale of stock because, the court believed, a control group does not lose its identity and continues to be the ERISA employer even when it loses one of its contributing members. But the Seventh Circuit view and the conventional view will often lead to different results. Under the conventional view of control groups, there would be withdrawal liability imposed on Sherwin-

[5] The original rule, which was then codified at § 1362(d), applied to employers. The present version, § 1369(b), was broadened to cover both employers and other entities, so the term "person," rather than "employer" is now used.

[6] There are two conditions: the withdrawal to be avoided must be based solely on the change of form; and the change must not result in an interruption in contributions to the pension plan.

Williams in this case because the sale of the stock of Lyons by Sherwin-Williams (a dissolution of the control group) caused an interruption in contributions to Central States so that § 1398 would not shield the employer from liability. In the Seventh Circuit's view, however, the Sherwin-Williams control group is still the Sherwin-Williams control group even after the sale of Lyons. "There was, and is, only one 'group' " the Sherwin-Williams group." App. A at 10a. Since contributions continue from another control group member (Dupli-Color), the Sherwin-Williams "employer" has not completely withdrawn and Sherwin-Williams is not liable. *Id.* Although Lyons ceased contributing (and withdrew), it cannot pay its withdrawal liability because it is bankrupt. According to the Seventh Circuit the pension plan (Central States) must bear the loss.

Nor does this case represent an academic foray into the ontology of control groups (*i.e.*, whether a given control group *exists* or not). Under 29 U.S.C. § 1398, each entity resulting from a "change in corporate structure" (a stock sale, for example) is a "successor" to the "original employer." This underscores that the drafters of the statute contemplated that a stock sale and other changes in corporate structure would work a real change in the identity of the pre-sale employer control group (why else refer to the "original" as opposed to the "successor" employer?). The Seventh Circuit's opinion in this case completely ignores this "successorship" provision of § 1398.

More important, in practical terms, the "successor" employers are succeeding to all or a portion of the pension contribution history of the original employer. PBGC Opinion Letter No. 92-1 (March 30, 1992), App. D at 59a. Pension contribution history (measured in "contribution base units") forms a basic component under the statute for determining each employer's withdrawal liability

in the event of a statutory withdrawal. One of the basic goals of MPPAA is to ensure that responsibility for contribution history is fully allocated to all contributing employers. *Pension Benefit Guaranty Corporation v. R.A. Gray,* 104 S.Ct. 2709, 2714 (1984). The successorship provision of § 1398 furthers that goal. By ignoring the successorship provision of § 1398, and denying that a stock sale results in the cessation of existence of the pre-sale control group, the Seventh Circuit has imperilled the concept of continuing responsibility for pension contribution history. The statute (§ 1398) indicates that an employer (control group member) who sells the stock of its subsidiary in a sale that *causes* an interruption of pension contributions from that subsidiary is liable as a "successor" for the subsidiary's contribution history. A stock sale that causes an interruption in contributions is *not* exempt from withdrawal liability under § 1398. Further, because § 1398 speaks of the "original" employer (before the sale) and successor employers (after the sale), the inference is clear that the statute intends the pre-sale employer to be viewed as annihilated and therefore subject to an immediate claim for withdrawal liability in the event of such a non-exempt stock sale. But the Seventh Circuit's opinion disregards this statutory mechanism for ensuring the continued responsibility for pension contribution history.

II. THE DECISION OF THE COURT BELOW HAS MADE ERISA UNWORKABLE IN ONE OF THE STATUTE'S MOST FUNDAMENTAL ASPECTS.

Nothing is more fundamental to the operation of Title IV of ERISA than the meaning of the term "employer." This is particularly true of the withdrawal liability provisions added by MPPAA, 29 U.S.C. §§ 1381-1405. (Of these 25 sections only §§ 1392 and 1400 do not refer expressly to the "employer.") It is therefore, fair to say that in the absence of a common understanding of the term "employer" the statute cannot be administered. For

over 15 years, however, a common understanding of the term has been consistently applied by multiemployer pension plans like Central States that are governed by the statute, by the Pension Benefit Guaranty Corporation ("PBGC"), the government agency that oversees the statute, and by the arbitrators and judges that have resolved disputes under the statute. Now the court below has decided that this common understanding is wrong. After expressly rejecting the PBGC's written interpretation and ignoring all of the case law on the subject (App. A at 9c), the court below chose an inapplicable regulation of a different agency as its source for defining this all-important ERISA term. Thus, for now, the law of the Seventh Circuit is different from the law elsewhere. But this is not a statute that will bear different interpretations in different venues on such a fundamental term. Plans like Central States deal with thousands of companies that make contributions to Central States on behalf of their employees. These companies and their employees are found in almost every state, and many (if not most) of them operate in more than one state. Sales of stock, which alter the composition of ERISA employers, are one of the most common events triggering scrutiny by a pension plan under the withdrawal liability provisions of ERISA. If the law varies from one circuit to the next, Central States (and other multiemployer plans) cannot know how to apply the law because it cannot tell in advance of litigation what law applies. Nor can a contributing employer be certain whether a sale of stock will result in liability until venue is established.

The flaw in the Seventh Circuit's reasoning may be discerned in the following statement of the court: "The regulations treat the 'controlled group' as having an independent existence, which survives the arrivals and departures that are so numerous in a corporate family of any size. We do not see how the Fund's position can be reconciled with this understanding." At least the court

was right in its last sentence—the two cannot be reconciled —but it is the court's understanding that is plainly wrong, in its first sentence. First, the court refers to the wrong regulation, 26 C.F.R. 1.1563-1, which defines "controlled groups" for tax purposes. This regulation does not, however, apply to ERISA where the appropriate term is "trades or businesses under common control" (which we have termed "control groups"). The latter term is found in ERISA at 29 U.S.C. § 1301(b)(1), which tells us to look to 26 U.S.C. § 414(c) and regulations thereunder for guidance. Thus, 26 C.F.R. 1.414(c)-1 and -2, are the regulations which deal with groups of trades or businesses under "common control" as used in ERISA.[7]

This may not matter, however, because the court below concluded erroneously and relied upon its belief that controlled groups under 26 C.F.R. 1-1563-1 have an existence independent of their components, which might come and go without effecting the controlled group's existence. This is plainly wrong. A controlled group has a unique structure for each tax year. Sherwin-Williams' controlled group the year before it sold Lyons is not the same under these tax regulations as Sherwin-Williams' controlled group the year after it sold Lyons. They are two different controlled groups with very different tax consequences under § 1563. The fact that both may be called (at least by the court below) the "Sherwin-Williams group" is not a product of the regulation, but of the court's own choice of terminology, and it does not make the two controlled groups the same.

Central States' view, which is consistent with the regulations under 26 U.S.C. § 414(c) (the ERISA regula-

[7] The court below apparently looked in error at regulation 26 C.F.R. § 1.414(b)-1, which directed it to regulation 26 C.F.R. § 1.1563. *See* App. A at 8a. While the regulations under 26 U.S.C. §§ 414(c) (i.e., 26 C.F.R. 1.414(c)) are similar to those under 26 U.S.C. § 1563 in some respects, the § 414(c) regulations are independent and stand apart from the other.

tion), is that a control group (the ERISA employer) has a unique make up. If the components change, a new control group (a new employer) is created and the old is dissolved. And, as we have shown, the tax regulations under 26 U.S.C. § 1563 work similarly in this respect Components do not arrive and depart like trains at a station; they are either in or out at a relevant point in time (the end of the tax year).[8] A new test is applied each year to determine the new controlled group. As an ERISA regulation 26 C.F.R. § 414(c) works similarly for trades or businesses under common control but does not focus on the end of the tax year.

Congress was well aware of how the tax code works when it wrote MPPAA. (The Joint Tax Committee was a principal author of the statute.)[9] It realized that sales of corporations that are components of a control group would have the consequence of altering the ERISA employer (by destroying the old group and giving birth to a new group) and thus causing withdrawals (and withdrawal liability) where none was warranted. So Congress wrote 29 U.S.C. § 1398 into the statute to mitigate.

> The bill treats an employer as withdrawing from a multiemployer plan when the employer (1) permanently ceased to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan. A withdrawal does not occur, however, where an employer ceases to exist merely by reason of a change in form or structure,

---

[8] Would a component of a 1995 controlled group headed by Sherwin-Williams be liable for the taxes of a 1994 controlled group headed by Sherwin-Williams to which it did not belong in 1994? Obviously not. The 1994 controlled group ceased to exist and a new controlled group came into being in 1995.

[9] The choices of terms and cross references are precise. ERISA Section 29 U.S.C. § 1301(b)(1) refers to "common control" with a reference to IRC § 414(c) (relating to common control) but not to "controlled group," a term under IRC §§ 1563 and 414(b).

> as long as the employer is replaced by a successor employer and there is no interruption in the successor employer's contributions to the plan or obligation to contribute under the plan. For example, if P Corporation owns 100 percent of the stock of S Corporation, a subsidiary that has an obligation to contribute to a multiemployer plan on behalf of its employees, the controlled group consisting of P and S would be considered an employer with an obligation to contribute to the plan. If P sells all of its interest in S to an unrelated party, the controlled group consisting of P and S would cease to exist. However, if S continues to have an obligation to contribute to the plan, no withdrawal would be considered to have taken place merely because of the change in ownership of S.

Multiemployer Pension Plan Amendments Act of 1980, Report of the Committee on Ways and Means U.S. House of Representatives; H.R. Rept. 96-869 (II) 96th Cong., 2nd Sess. (1980); 1980 U.S. Code Cong. & Admin. News 2993, 3005-3006. Section 1398 makes the resulting employer (new control group) a successor to the old control group and thus not a new employer (in the statutory language "a withdrawal does not occur"). If a withdrawal does not occur, then the corporate components are not individually liable for withdrawal liability. But if § 1398 does not apply (e.g. the sale causes an interruption in contributions), then a withdrawal does occur because the old control group (employer) is destroyed. At the point of dissolution withdrawal liability would attach to each component of the old control group.

Perhaps the Seventh Circuit put too much stock in its "family" metaphor. It saw the employer as the Sherwin-Williams group both before and after the sale of Lyons because Sherwin-Williams was the parent corporation and the court applied the same family name to both groups. (A family, we suppose, is still a family even though it marries off a daughter.) But this metaphor breaks down

quickly under ERISA. There are two kinds of common control and the same rules apply to both. Sherwin-Williams was of the parent-subsidiary variety. There is also a brother-sister type. Suppose Lyons and Dupli-Color were owned by an individual (Mr. Williams). Only Lyons and Dupli-Color would be in the control group. Would it be the Lyons group or the Dupli-Color group or the Williams group? And if Lyons stock is sold, who would be the surviving control group? Obviously neither. The brother-sister group would cease to exist when Lyons was sold. It would take § 1398, to insure a withdrawal does not occur and to make the separated components successors to the original employer (and inheritors of its contribution history). *See* PBGC Op. Ltr. 92-1 (March 30, 1992) App. D at 59a. The Seventh Circuit's rational simply does not accommodate both kinds of control group as it must if ERISA is to work on a consistent basis.

In short the Seventh Circuit failed to see how ERISA (and Congress) views the term employer. Instead the court tried to impose its own view without a thought to the consequences. But consequences there are. Fifteen years of settled law are undone. Plans can no longer safely assess withdrawal liability because they can no longer be sure what the term employer means. And since the Seventh Circuit's views are unique to its circuit, these plans and employers that operate across circuit boundaries will be subject to conflicting interpretations of the law as applied to specific events that can only be reconciled by a race to the courthouse. The court should grant a writ of certiorari because of the detrimental consequences of national scope of this conflict in applying ERISA.

III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *CHEVRON v. NRDC.*

The decision below is also in conflict with this Court's decision in *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), by ignoring the

interpretation given the statute by the federal agency responsible for administering the statute. In *Chevron*, this Court ruled that if a statutory term is ambiguous and that ambiguity cannot be resolved in statutory context, the court should turn to the interpretation given by the agency of the government charged with oversight of the statute. If such interpretation is based upon a permissible construction of the statute, the court should defer to the agency's interpretation. 104 S.Ct. at 2781-82. Further, this court has particularly underscored the importance of PBGC's views in interpreting Title IV of ERISA. *PBGC v. LTV Corp.*, 496 U.S. 633, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990); *Mead v. Tilley*, 490 U.S. 714, 109 S.Ct. 2156, 104 L.Ed.2d 796 (1989).

Beginning with an opinion letter in 1982 the PBGC had consistently given its interpretation that ERISA § 1398 applies to a sale of stock that alters a control group. PBGC Op.Ltr. 82-4 (Feb. 10, 1982), App. D at 45a. *See also* PBGC Op.Ltr. 84-7 (Dec. 20, 1984) and 92-1 (Mar. 30, 1991), App. D at 56a and 59a. To the Seventh Circuit, however, "[t]he PBGC's Opinion Letter 92-1 . . . appears to make a contrary [to the court's] assumption about the effect of § 1398 . . . ." App. A at 9a. The assumption referred to is the court's assumption that control groups survive purchases and sales of stock. *Id.* But, as we showed above, transactions that leave the parent unaffected do not necessarily also leave the control group unaffected. In PBGC Op.Ltr. 83-11 (May 16, 1983), App. D at 54a, PBGC noted that even the creation of a subsidiary within a control group will create a new employer requiring application of § 1398 to prevent a withdrawal.

The court below has laid waste to these agency opinions. The point of requiring deference to the agency under *Chevron* is recognition that an agency generally has superior expertise in interpreting its own statute to that of a court. This is particularly true of ERISA as this

case shows. The Seventh Circuit erred in its independent analysis. It should have relied upon the PBGC, which knew what it was doing.

The court apparently lost confidence in PBGC because PBGC distinguished between sales of stock and sales of assets, which the court below viewed as essentially the same thing under ERISA. *See* App. A. at 9a. What the court overlooked is that Congress made the distinction between these kinds of sales and PBGC was merely following congressional direction as should the court below. *See* PBGC Op.Ltr. 82-17 (May 26, 1982) and 82-40 (Dec. 27, 1982), App. D at 48a and 51a.[10] Sales of assets are handled expressly in 29 U.S.C. § 1384. Sales of stock are subsumed under § 1398. If there were any doubt, Congress provided explicit direction in the committee report that accompanied the statute by virtually quoting § 1398 and then giving an example of its application to a sale of stock.

> A withdrawal does not occur, however, where an employer ceases to exist merely by reason of a change in form or structure, as long as the employer is replaced by a successor employer and there is no interruption in the successor employer's contributions to the plan or obligation to contribute under the plan. For example, if P Corporation owns 100 percent of the stock of S Corporation, a subsidiary that has an obligation to contribute to a multiemployer plan on behalf of its employees, the controlled group consisting of P and S would be considered an employer with an obligation to contribute to the plan. If P sells all of its interest in S to an unrelated party, the controlled group consisting of P and S would cease to exist. However, if S continues to have an obligation to contribute to the plan, no withdrawal

---

[10] *See also Bowers v. Andrew Weir Shipping*, 27 F.3d 800, 807-808 (2nd Cir. 1994) (distinguishing sales of assets under § 1384 from sales of stock under § 1398).

> would be considered to have taken place merely because of the change in ownership of S.

Multiemployer Pension Plan Amendments Act of 1980, Report of the Committee on Ways and Means U.S. House of Representatives; H.R. Rept. 96-869 (II) 96th Cong., 2nd Sess. (1980); 1980 U.S. Code Cong. & Admin. News 2993, 3005-3006. There is good reason for a distinction between stock and asset sales. When a corporation is sold as an on-going contributor to a pension plan,, the corporation's contracts go with it, including the collective bargaining agreement under which it contributes. When operating assets are sold, by contrast, the buyer does not necessarily assume the contracts and certainly not the ERISA liabilities of the seller. Thus for a seller of assets to avoid liability it must apply 29 U.S.C. § 1384, which requires the buyer's voluntary assumption of responsibility. Whereas a corporation in a stock sale transaction carries its liabilities with it as a matter of corporate law. Thus §§ 1384 and 1398 achieve a similar result (no withdrawal and liability follows the sold operations) by different means.

Since the PBGC interpretation is a permissible construction of the statute, the court below should have deferred to it. By detouring into the complexities of asset sales, the court below lost its way. Having rejected PBGC as its compass, it blazed its own trail to a result at odds with the world. Because the Seventh Circuit failed to give the deference required by *Chevron* and *LTV*, this court should grant the writ of certiorari.

IV. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE THIRD, SIXTH AND NINTH CIRCUITS.

The court below held that when Sherwin-Williams sold Lyons it did not withdraw from Central States—not because 29 U.S.C. § 1398 applied to save it (the court believed § 1398 did not apply to a stock sale), but because

the employer, the Sherwin-Williams group, remained intact as a contributor (through Dupli-Color). This places the Seventh Circuit in conflict with the Third, Sixth, and Ninth Circuits, each of which has held that § 1398 does apply to stock sales and necessarily held (by implication) that if the requirements of § 1398 are not met, then the sale of stock constitutes a withdrawal due to the dissolution of the control group.[11]

In *Penn Central Corp. v. Western Conference of Teamsters Pension Trust Fund,* 75 F.3d 529 (9th Cir. 1996) the court faced a situation where a parent corporation (Penn Central) sold its only contributing subsidiary (Buckeye Gas) in a stock sale. "There is no question that Penn Central completely withdrew from the plan . . . when it sold Buckeye Gas. . . ." *Id.* at 533. "Penn Central ceased to exist as a covered employer and was subject to an assessment of withdrawal liability for its former subsidiaries." *Id.* "The real question in this case is whether Penn Central is exempt under 29 U.S.C. § 1398 from paying the withdrawal liability for G.K. and Marathon."[12] Obviously the Ninth Circuit applied § 1398 under circumstances that the court below determined had no bearing on § 1398. Moreover, in arriving at its conclusion the Ninth Circuit relied on the very PBGC Op. Ltr. (92-1, App. D at 59a) that the court below rejected. "We are obligated to defer to the PBGC's interpretation '[e]ven if reasonable minds could differ as to the proper interpretation of the statute.' *Elliott v. Carpenters' Pension Trust Fund,* 859 F.2d 808, 813 (9th

[11] The Second Circuit has also agreed with this interpretation in *Bowers v. Andrew Weir Shipping,* 27 F.2d 800, 805 (2nd Cir. 1994).

[12] G.K. and Marathon were subsidiaries (and contributors) that had been shut down before the sale of Buckeye. No withdrawal could occur while Buckeye remained in the control group as a contributor. When Buckeye was sold, Penn Central became liable because, while § 1398 might apply to Buckeye, it did not apply to G.K. and Marathon.

Cir. 1988), *cert. denied,* 490 U.S. 1036 (1989)." While the court relied upon its own cases to establish the deference due the PBGC, these cases are plainly consistent with *Chevron, USA,* and *LTV,* which require the same deference to the agency.

The Sixth Circuit decision in *Teamsters Pension Trust Fund v. Central Michigan Trucking,* 857 F.2d 1107 (6th Cir. 1988) also conflicts sharply with the decision below. In that case Fuqua Industries spun off the stock of Interstate Motor Express, essentially a stock sale. The court held that Fuqua was exempt from liability because pursuant to § 1398 Interstate assumed the original employer position previously held by Fuqua. *Id.* at 1109. The court specifically noted "that the common control 'employer' ceases to exist when a parent corporation sells the stock of a wholly owned subsidiary." Thus, the Sixth Circuit disagrees on both questions with the court below: The employer ceases to exist upon a sale of stock and § 1398 applies to exempt the control group from liability. Indeed the court also relied upon the legislative history and the PBGC opinion that the court below rejected. *Id.* at 1110. Finally the court addressed the tax regulations relating to control groups.

> MPPAA expressly incorporates the Internal Revenue Codes' control group provisions only to the extent that they define a control group of corporations. 29 U.S.C. § 1301(b)(1). If Congress had intended to engraft onto the pension statute the tax provisions regarding successorship following the termination of common control, it could have expressly done so. *See United Food and Commercial Workers Union v. Progressive Supermarkets,* 664 F.Supp. 633, 638 (D. N.J. 1986). Absent such an express provision, tax precepts governing successorship are not dispositive of the meaning of MPPAA's successorship provision. *Cf. United Steelworkers v. Harris & Sons Steel Co.,* 706 F.2d 1289, 1289-99 (3rd Cir. 1993).

Id. at 1111. While the court was addressing a different set of tax regulations, the point applies equally to

§ 1.1563-1 upon which the court below relied. The decision below is thus at odds in all respects with the Sixth Circuit decision.

The Third Circuit decision in *Dorn's Transportation v. Teamsters Pension Trust Fund,* 787 F.2d 897 (3d Cir. 1986) also applied § 1398 to a stock sale to the effect that there was no withdrawal. *Id.* At 901 ("we believe that the district court was correct in concluding that, under § 1398, there was no withdrawal"). In that case Oneida Motor Freight, a contributor, purchased the stock of Dorn's Transportation, another contributor. Dorn's employees were then transferred to Oneida and Dorn's ceased contributing. The district court had ruled that there was no withdrawal due to § 1398 and also due to § 1301 (using the single control group concept to encompass Dorn's before and after the sale). The Third Circuit left that "problematic holding" regarding § 1301 for another day because of its ruling under § 1398; but the court was critical of the district court. "The potential problem with the district court's interpretation of § 1301 is that it may risk making that section a catch-all exemption that enables circumvention of the requirements of the explicit exemptions such as §§ 1384 and 1398." 787 F.2d at 900, n. 4. The court noted that under such an interpretation of § 1301 "the other exemptions may thus be rendered nugatory." *Id.* Thus, the Third Circuit rejected the very theory adopted by the court below and relied instead on § 1398, which the court below rejected.

In sum all three circuits relied upon § 1398 in a stock sale situation in conflict with the Seventh Circuit. (Question 2.) By necessary implication each circuit accepted that a control group employer is extinguished when it alters its form by a sale or purchase of stock of another corporation; and the Sixth Circuit expressly agreed that the control group ceased to exist in conflict with the Seventh Circuit. (Question 1.) Moreover the other circuits are directly in conflict with the Seventh Circuit on

each of its points of analysis. The Ninth and Sixth Circuits deferred to the PBGC interpretation of the statute in accord with *Chevron, USA*, while the Seventh Circuit did not. The Sixth Circuit rejected reliance on tax regulations, while the Seventh Circuit relied upon them. And without citing the tax regulations, the Third Circuit severly question whether a control group maintains its identity (remains the employer) where a corporate member is bought or sold, while the Seventh Circuit thought it did.

Pension plans like Central States cannot effectively operate where the law of one circuit within which they operate varies so severely from the law in the other circuits within which they operate. This Court should grant the writ of certiorari to resolve this conflict.

CONCLUSION

For these reasons the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

THOMAS C. NYHAN *
General Counsel
TERENCE G. CRAIG
JAMES P. CONDON
CENTRAL STATES, SOUTHEAST
AND SOUTHWEST AREAS
PENSION FUND
9377 West Higgins Road
Rosemont, Illinois 60018-4938
(847) 518-9800

* Counsel of Record

APPENDICES

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 95-1952 & 95-2028

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
Plaintiff-Appellant,
Cross-Appellee,

v.

THE SHERWIN-WILLIAMS COMPANY,
Defendant-Appellee,
Cross-Appellant.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 94 C 6123—Milton I. Shadur, *Judge*

Argued October 24, 1995—Decided December 14, 1995

Before EASTERBROOK, KANNE, and ROVNER, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Between 1987 and 1990 a subsidiary of The Sherwin-Williams Company owned 100% of the stock of Lyons Group, a motor carrier. Lyons was a losing proposition for Sherwin-Williams (as

we call the firm and its subsidiaries, collectively), which not only lost money on operations but also sold the stock for less than it paid. The Central States Pension Fund, a multi-employer fund to which Lyons contributed, believes that the price Sherwin-Williams must pay for this adventure exceeds the business losses; when it sold Lyons, the Fund contends, the entire Sherwin-Williams family of companies withdrew and incurred substantial liabilities under the Multiemployer Pension Plan Amendments Act of 1980, which requires firms that pull out of underfunded plans to chip in. See *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 115 S. Ct. 981 (1995); *Connolly v. PBGC*, 475 U.S. 211 (1986); *PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984); *Artistic Carton Co. v. Paper Industry Union-Management Pension Fund*, 971 F.2d 1346 (7th Cir. 1992).

Sherwin-Williams has another subsidiary (Dupli-Color) that still contributes to the Fund, but the Fund insists that this does not matter. The argument goes like this. Sherwin-Williams and all of its subsidiaries and affiliates are a single employer by virtue of 29 U.S.C. § 1301(b)(1). When it sold Lyons, Sherwin-Williams changed the constituents of its corporate group. The old group, minus Lyons, became a new group. An employer withdraws completely when it "permanently ceased all covered operations under the plan." 29 U.S.C. § 1383(a)(2). Old Sherwin-Williams ceased to exist, just as if it had liquidated and distributed its assets, and thus "permanently ceased all covered operations under the plan." New Sherwin-Williams continued to be a contributing employer, but the fact that one employer joins a plan as another employer withdraws does not relieve the withdrawing employer of its liability. One provision of the MPPAA, 29 U.S.C. § 1398(1)(A), provides that the successor to an employer that winks out of existence because of a "change in corporate structure described in section 1869(b) of this title" is "considered the original employer." Section 1369

(b)(3) deals only with corporate "division," and although "division" is an undefined term the sale of a subsidiary's stock is a form of corporate "division." See PBGC Opinion Letters 82-4 (Feb. 10, 1982), 84-7 (Dec. 20, 1984). But § 1398(1) applies only if "the change causes no interruption in employer contributions or obligations to contribute under the plan". Six months after its spinoff, Lyons ended operations and filed for bankruptcy. Its demise scotched any exemption under 29 U.S.C. § 1384, which applies only if a business provides security for five years' worth of contributions after the sale. If, as the Fund believes, Lyons' failure was "caused" by the sale, the new Sherwin-Williams corporate group also loses § 1398's shelter and must pay approximately $2 million in withdrawal liability. The difference between Lyons' own withdrawal liability of some $1.76 million and the $2 million figure for the entire Sherwin-Williams group likely is less important to the Fund than is the fact that its group-withdrawal approach ensures that the solvent Sherwin-Williams picks up the entire tab (which exceeds the price it realized from the sale of the Lyons stock) whether or not the transaction was designed to "evade or avoid" withdrawal liability, which under 29 U.S.C. § 1392(c) would require Sherwin-Williams to make good Lyons' debt. To collect under § 1392(c) a pension trust must establish that avoiding withdrawal liability was a principal purpose of the transaction, and the difficulty of proving intent may explain why the Fund has not pursued this possibility. See *Santa Fe Pacific Corp. v. Central States Pension Fund*, 22 F.3d 725 (7th Cir. 1994).

Sherwin-Williams and the Fund took their differences to an arbitrator, as the MPPAA requires. The arbitrator stated that the Fund had not presented any claim that the sale of Lyons' stock was designed to "evade or avoid" withdrawal liability or that it represented a "partial withdrawal" of the Sherwin-Williams group under § 1385(a). The only question on the table, the arbitrator thought,

was whether the sale produced a complete withdrawal of the old Sherwin-Williams group. Observing that Dupli-Color continues to participate in the Fund, the arbitrator concluded that the group's withdrawal is not "complete." As the arbitrator saw things, the Fund is trying to have things both ways: it treats the sale of Lyons' stock as dissolving the old Sherwin-Williams group and substituting a new group, yet it seeks to hold the new group responsible for the old group's liability. If Lyons' departure really caused the old Sherwin-Williams group to withdraw, then the old group logically should be liable; yet looking at the old group's operations would make it plain that withdrawal had *not* been complete—for in mid-1990 both Lyons and Dupli-Color were active contributors. The Fund sought to collect from the Sherwin-Williams group existing today, which under the Fund's theory is a different employer from the one responsible for Lyons. Moreover, Lyons' failure without surviving for five years meant that it never really became a stand-alone entity, and § 1384 attributed its failure to Sherwin-Williams. With Lyons treated as if reabsorbed into the group, neither a change of employer nor a complete withdrawal occurred.

The district judge, entitled to review the arbitrator's legal conclusions independently, see *Trustees of Iron Workers Local 478 Pension Trust v. Allied Products Corp.*, 872 F.2d 208, 211-12 (7th Cir. 1989), took a different route to the same conclusion. 879 F. Supp. 867 (N.D. Ill. 1995). The judge disagreed with the arbitrator's conclusion that Lyons' failure meant that the sale of stock should be disregarded for the purpose of identifying the employer. Only a transaction condemned under § 1392(c) should be treated as if it had not occurred, the judge believed, and the Fund has not argued that Sherwin-Williams sold the Lyons stock to "evade or avoid" withdrawal liability. But the judge believed that § 1398, on which the Fund does rely, has nothing to do with this case. The statute creating liability for complete withdrawal

is § 1383(a), which asks whether the employer has ceased making contributions. Only the old Sherwin-Williams group could have ceased contributing (for, on the Fund's theory, the new group did not come into existence until the old group sold Lyons). Yet the old group didn't cut off all contributions; Dupli-Color remains a participating employer. Any attempt to reason backwards from § 1398 to the definition of a complete withdrawal, the judge thought, "would really be *non*-statutory in nature, calling for the judicial recognition of an implied private cause of action where Congress has not expressly created one. And on that score the Supreme Court's increasing reluctance to recognize such implied rights of action should be controlling here." 879 F. Supp. at 877 (emphasis in original).

Although implied rights of action are not in vogue, ERISA and the MPPAA have plenty of express rights of action. In particular, 29 U.S.C. § 1401(b)(2) permits a multi-employer pension fund to recover withdrawal liability. Ours is not a case like *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993), or *Reich v. Continental Casualty Co.*, 33 F.3d 754 (7th Cir. 1994), where the provision of one right of action implied the withholding of another. Neither the arbitrator nor the district court directly confronted the Fund's central argument: that when Sherwin-Williams sold its stock in Lyons, the old Sherwin-Williams group vanished, as if it had fallen into one of Kurt Vonnegut's chrono-synclastic infundibulums. Ex-groups necessarily have withdrawn, fully and permanently, and owe withdrawal liability unless some statute prevents collection. Section 1398, the only candidate, is not up to the task, according to the Fund, because the stock sale "caused" Lyons to fail.

Now we have serious doubts that a sale of stock can be blamed for a business failure. Transfer of the certificates ownership does not affect the firm; that the identity of

the investors does not alter business operations is a central feature of corporate law. See *Baxter Healthcare Corp. v. O.R. Concepts, Inc.*, No. 95-1725 (7th Cir. Nov. 2, 1995). Stock certificates are corporate liabilities—and contingent ones at that, for the owners are not entitled to dividends in the same way debt investors are entitled to interest. If the sale of stock were accompanied by some other event—the sale of assets for an inadequate price, the replacement of top managers, or the assumption of liabilities creating a negative cash flow—then the transaction might alter the firm's prospects. But the Fund does not contend that Sherwin-Williams stripped Lyons of its profitable assets and sold only chaff; it seems to have sold the business intact. If so, then competition from other motor carriers, rather than the sale of stock, must be the prime candidate for an explanation of Lyons' failure; recall that Lyons had been headed downhill while Sherwin-Williams was its sole owner. One could say that Sherwin-Williams was better situated than its successor to invest new capital in Lyons' business, but stockholders are not obliged to throw good money after bad—are not obliged to pony up extra money under any circumstances. That is the meaning of limited liability, and of the rule in most corporate codes that shares are "nonassessable" once paid for. See *Model Business Corporation Act* § 6.21(d) (1984 rev.); see also *id.* at § 6.22. Because the arbitrator ruled against the Fund without addressing the causation question, however, it is not possible to decide the case on this ground. We must assume that the sale of stock caused the collapse. The question remains whether the sale of a subsidiary terminates the existing corporate group and causes a new, shrunken group to spring into existence.

What if Sherwin-Williams had acquired a new subsidiary instead of selling an existing one? If any change in the composition of a corporate group winds up the life of that group, then this acquisition produces a "complete withdrawal" with concomitant liability. So too with

the closing of 1 out of 100 subsidiaries that contribute to the Fund; nothing in the Fund's argument logically depends on the fact that Sherwin-Williams had only two contributing subsidiaries. Why stop with the sale or purchase of a subsidiary? What about the opening of a new plant or terminal or corporate division, or the close of an old one? A corporation is just a nexus of contracts, subject to rearrangement in many ways. Section 1301 (b)(1) and the implementing regulations are designed to treat subsidiaries like divisions. If selling stock means a complete withdrawal, then so does a change in divisional organization or operation. Cf. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (treating subsidiaries and divisions alike for purposes of the antitrust laws). And that is not all. What about the sale of a key patent, which may mean more to the firm's operations than any division or subsidiary? Change is the one constant in corporate organization. Employees, plants, products, divisions, subsidiaries, all come and go. Heraclitus quipped that you cannot step twice into the same river. A corporate group is always changing, and the change flows more swiftly than many rivers. "Complete withdrawal" then must be frequent. Many of these will not come within § 1398. Return to the 1-in-100 subsidiary example: closing one subsidiary causes an interruption in that corporation's contributions.

Does it make sense of the statute to treat our 1-in-100 example as a "complete withdrawal" of the entire corporate group? The MPPAA draws a sharp line between complete and partial withdrawal. Under § 1385 a withdrawal is only "partial" unless the contribution decline exceeds 70%, or there is "a partial cessation of the employer's contribution obligation." 29 U.S.C. § 1385(a)(2). If a single corporation has 100 plants, the closing of one will not produce either a full or a partial withdrawal unless the closed plant did 70% of the firm's business. (If the closed facility employed more than 20% of the firm's covered workers, the substantial-employer rules of

29 U.S.C. §§ 1363-65 govern. See 29 U.S.C. § 1362(e).) The PBGC believes that closing a subsidiary should be treated just like closing a plant, and that selling all of a subsidiary's assets should be treated just like closing a subsidiary. Opinion Letter 92-1 (Mar. 30, 1992). Yet under the Fund's view, each of these transactions would extinguish the group and create complete withdrawal, because each causes a subsidiary to disappear. Given the statutory objective of treating a firm that organizes into a holding company with 100 subsidiaries just like a corporation organized into 100 divisions, it must follow that a group's sale of a single subsidiary's stock should be treated like selling its assets, or like selling an unincorporated division, and therefore does not produce a complete withdrawal of the group—not unless that subsidiary was the only one making contributions to a particular plan.

Section 1301(b)(1) reinforces this conclusion, albeit indirectly. This section reads: "For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of Title 26." The PBGC's regulations, in 29 C.F.R. Part 2612, do nothing but point to the IRS regulations under § 414. Regulations under § 414 do little beside point elsewhere. See 26 C.F.R. § 1.414(b)-1. The end of this chain is 26 C.F.R. § 1.1563-1, which defines a "controlled group." Section 1.1563-1 is founded on the premise that the departure (or arrival) of a subsidiary does not terminate the controlled group and create a "new group." Instead the regulations speak of "component members" arriving and departing, and they provide rules for determining the effective date of these

transactions. 26 C.F.R. § 1.1563-1(b). The regulations treat the "controlled group" as having an independent existence, which survives the arrivals and departures that are so numerous in a corporate family of any size. We do not see how the Fund's position can be reconciled with this understanding.

What then is one to make of § 1398? As we read it, § 1398 is a savings clause, a proviso that comes into play only if some other step causes the participant to vanish. Consider some common reorganizations: (i) A dissolves and distributes its assets to B and C, which carry on the same business as A did. (ii) D merges into E, which is the surviving corporation. (iii) F recapitalizes by selling its assets to G, which pays with money raised from issuing debentures. F distributes the cash to its old investors and dissolves. G next merges into H, the source of the capital, which owns all of G's stock. H renames itself "F Corporation." In all three of these cases, and many similar ones, the original participant in the pension plan vanishes under standard doctrines of corporate law, but the business continues. Without some rule allowing the substitution of its successor, a transaction that has no economic effect on the pension fund would generate a windfall of withdrawal liability; and the prospect of this liability could prevent reorganizations that have benefits for investors, employees, and customers alike. Sales of existing subsidiaries, and other transactions that under corporate law leave the parent unaffected, need no such shelter. Both corporate law and the Treasury regulations to which § 1301(b)(1) send us treat controlled groups as surviving purchases and sales of stock. The PBGC's Opinion Letter 92-1, to which we have already referred, appears to make a contrary assumption about the effect of § 1398, distinguishing the sale of a subsidiary's stock from the sale of a subsidiary's assets, but the opinion letter does not say why. Unexplained assumptions are a poor basis for statutory interpretation.

It may be that some members of Congress, talking on the floor, understood § 1398 as the Fund does (although they certainly did not parse its language). Congressional assumptions are some distance from rules of law. *American Hospital Ass'n v. NLRB*, 499 U.S. 606, 615-17 (1991). The statute delegates to the PBGC (and indirectly to the Secretary of the Treasury) the power to define groups, and that regulatory perspective must be respected. There was, and is, only one "group": the Sherwin-Williams group. No "old Sherwin-Williams group." Just one group comprising changing assortments of assets and operations. That group has not completely withdrawn from the Fund.

One final issue requires only brief treatment. Sherwin-Williams sought attorneys' fees and filed a cross-appeal from the district court's decision requiring each side to bear its own costs and fees both in court, the province of 29 U.S.C. § 1451(e), and before the arbitrator, to which 29 U.S.C. § 1401(a)(2) applies. The right question on appeal is whether the district court abused its discretion. *Hooper v. Demco*, 37 F.3d 287, 291 (7th Cir. 1994); *Nichol v. Pullman Standard, Inc.*, 889 F.2d 115, 121 (7th Cir. 1989). Cf. *Pierce v. Underwood*, 487 U.S. 552 (1988), holding that deferential appellate review is the right standard under another statute similar to the attorneys' fees provisions of ERISA. Regulations say that the court should not shift arbitral attorneys' fees unless the loser acts "in bad faith or engages in dilatory, harassing, or other improper conduct during the course of the arbitration". 29 C.F.R. § 2641.9(c). This record does not contain a whiff of such conduct. As for the proceedings in the district court: the loser must pay if its position lacked a substantial basis. See *Central States Pension Fund v. Lady Baltimore Foods, Inc.*, 960 F.2d 1339, 1347 (7th Cir. 1992). Although we have established a presumption that one who challenges an arbitrator's award and loses lacked substantial justification, see *Continental Can Co. v. Chicago Truck Drivers Pen-*

sion Fund, 921 F.2d 126 (7th Cir. 1990), a presumption can be overcome. The district court concluded that it had been, because this is a case of first impression with decent arguments on each side. That assessment strikes us as sensible; certainly it is not an abuse of discretion.

AFFIRMED

A true Copy:
Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 94 C 6123

CENTRAL STATES, SOUTHEST, AND
SOUTHWEST AREAS PENSION FUND
and HOWARD MCDOUGALL, trustee,
Plaintiffs,

v.

SHERWIN-WILLIAMS COMPANY,
Defendant.

No. 94 C 6129

SHERWIN-WILLIAMS COMPANY,
Plaintiff,

v.

CENTRAL STATES, SOUTHEAST, AND
SOUTHWEST AREAS PENSION FUND,
Defendant.

MEMORANDUM OPINION AND ORDER

Central States, Southeast and Southwest Areas Pension Fund and its Trustee (collectively "Fund," treated as a singular noun [1]) seeks to modify and vacate an arbitra-

---

[1] Because Fund is a frequent litigant in the federal courts, and to avoid cumbersome repetition, citations to others of its cases and to avoid cumbersome repetition, citations to others of its cases in this opinion will refer to it simply as "Central States Fund" rather than spelling out its full name.

tion award (the "Award") in favor of Sherwin-Williams Company ("Sherwin-Williams") on Fund's claim against Sherwin-Williams for complete withdrawal liability under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1368, as amended by the Multiemployer Pension Plan Amendments Act ("MPPAA"), 29 U.S.C. §§ 1381-1461.[2] For its part, in a lawsuit filed immediately after Fund's,[3] Sherwin-Williams seeks enforcement of the Award, plus a modification that would grant it the recovery of its attorney's fees and expenses associated with the arbitration. In addition, Sherwin-Williams asks to recover its attorney's fees and expenses associated with these actions.[4]

Both Sherwin-Williams and Fund now move for summary judgment under Fed. R. Civ. P. ("Rule") 56. For the reasons stated in this memorandum opinion and order:

1. Sherwin-Williams' motion for enforcement of the Award is granted, while its motions to modify the Award and for recovery of its attorney's fees and expenses are denied.

2. Fund's motion is denied.

---

[2] All ERISA and MPPAA provisions will be cited simply "Section ——," referring to their Title 29 numbering rather than to ERISA's or MPPAA's internal numbering.

[3] As the numbers of the two actions suggest, they were actually filed on the same day. Random assignment resulted in their original allocation to the calendars of two different judges, but the Sherwin-Williams action has since been reassigned to this Court's calendar.

[4] This is not the first time the parties have been before this District Court. Three years ago this Court's colleague Honorable John Grady refused to reach Sherwin-Williams' constitutional attack on MPPAA in an earlier action that it brought against Fund (787 F.Supp. 136 (N.D. Ill. 1992)).

Legal Standards

This Court's authority "to enforce, vacate, or modify the arbitrator's award" under MPPAA derives from Section 1401(b)(2). Findings of fact made by the arbitrator are presumed correct, rebuttable only by a clear preponderance of the evidence (Section 1401(c)).[5] But an arbitrator's conclusions of law are subject to de novo review (*Central States Fund v. Bell Transit Co.*, 22 F.3d 706, 710 (7th Cir. 1994)), and summary judgment is in order "when no genuine issues of material fact exist and when the moving party is entitled to judgment as a matter of law" (*id.*).[6]

On each current motion this Court is "not required to draw every conceivable inference from the record—only those inferences that are reasonable"—in the light most favorable to the nonmovant (*Bank Leumi Le-Israel, B.M. v. Lee*, 928 F.2d 232, 236 (7th Cir. 1991) and cases cited there). Because both Sherwin-Williams and Fund have moved for summary judgment, it is necessary to adopt "a dual perspective—one that this Court has often described as Janus-like—that sometimes involves the denial of both motions" (*Camelot Care Ctrs., Inc. v. Planters Lifesavers Co.*, 836 F. Supp. 545, 545 (N.D. Ill. 1993)). But because the material facts here are not in dispute, no such hazard is posed in setting out the following account of the developments leading to arbitration.

---

[5] Mixed questions of law and fact are reviewed under a similar "clearly erroneous" standard (*Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent) Pension Fund v. Louis Zahn Drug Co.*, 890 F.2d 1405, 1411 (7th Cir. 1989)).

[6] Though the arbitrator's Sept. 12, 1994 decision ("Decision") at 11 leaves it unclear whether he granted Sherwin-Williams' motion for summary judgment or its alternative motion to dismiss, that makes no difference in the resolution of the matter.

Facts [7]

Sherwin-Williams is a large employer with a number of subsidiaries and branches. Fund is a multiemployer plan as defined in Section 1002(37).

In January, 1987 a Sherwin-Williams subsidiary purchased 100% of the outstanding stock of Lyons Group, Inc. from the then owners: Lyons Group, Inc. Employee Stock Ownership Plan and Trust and a number of individual shareholders. Lyons Group, Inc. was then the holding company for Lyons Transportation Lines, Inc. ("Lyons"), a less-than-truckload motor carrier. In turn Lyons was obligated to contribute to Fund on behalf of certain eligible employees.

Lyons quickly became a losing proposition for Sherwin-Williams. Having re-evaluated its entry into the less-than-truckload carrier sector, about May 31, 1990 Sherwin-Williams sold the Lyons stock to J.R.C. Acquisition Corp. ("J.R.C.") for a $1.6 million down payment plus an installment obligation of $6.25 million payable over a six-year period, secured by mortgages on Lyons' real property.

Lyons continued to make contributions to Fund until October 12, 1990. Then on October 19, 1990 both J.R.C. and Lyons filed for Chapter 11 bankruptcy. On November

---

[7] This District Court's General Rule ("GR") 12(m) and 12(n) respectively require the submission of factual statements in support of and in opposition to Rule 56 motions. Fund complied with those rules by filing a GR 12(m) statement, but Sherwin-Williams has neglected to file anything that even remotely resembles the required submissions. Our Court of Appeals has ruled consistently that the GR 12 requirements may be applied strictly even where the parties have not engaged in the type of willful conduct that might trigger a default judgment (*Johnson v. Gudmundsson*, 35 F.3d 1104, 1108 (7th Cir. 1994)). Thus all facts claimed and adequately supported by Fund may be assumed true by this Court (*Stewart v. McGinnis*, 5 F.3d 1031, 1034 (7th Cir. 1993)), though that really makes no difference in cases such as this where the parties agree on the relevant facts.

30, 1990 Fund assessed Lyons' withdrawal liability at $1,764,339.15 due to what Fund's letter labeled Lyons' "permanent cessation of contributions to Fund, Southeast and Southwest Areas." Fund viewed the Lyons stock sale to J.R.C. as the proximate cause of Lyons' collapse and consequently sought to hold Sherwin-Williams accountable as a member of the commonly controlled group that had included Lyons.

On March 1, 1991, Sherwin-Williams submitted a Request for Review to Fund to contest the assessment of such liability. Sherwin-Williams first asserted that neither it nor Lyons was a member of any controlled group of trades or businesses at the time that Lyons stopped contributing to Fund, because Sherwin-Williams had already sold Lyons in a bona fide transaction. Alternatively Sherwin-Williams argued that it could not be held liable for a complete withdrawal in any event because Dupli-Color, another Sherwin-Williams entity that it had acquired in 1985, continued to contribute to Fund even after the Lyons bankruptcy. Finally, if Sherwin-Williams were to be found liable for a partial withdrawal, the company argued that such liability could not be calculated until the end of 1993 under the three-year provision of Sections 1385(b) and 1386.

It was not until it received a January 22, 1992 letter that Sherwin-Williams learned that Fund had denied its request. As required by Section 1399(c)(2), Sherwin-Williams paid a total of $1,988,989.62 to Fund pursuant to its assessment from March 1991 through January 1993. Then Sherwin-Williams exercised its option under Section 1401(a) to request arbitration of that assessment following the denial of its Request for Review.

Arbitrator Lawrence Katz was assigned to the matter under American Arbitration Association procedures. Arbitrator Katz first determined, in a January 4, 1994 letter ruling, that the issue of Sherwin-Williams' *partial* with-

drawal was not properly before him and that what he had to decide was whether Sherwin Williams had *completely* withdrawn from Fund. In his later Decision the arbitrator held that Sherwin-Williams could not be held liable for a complete withdrawal where other members of the Sherwin-Williams controlled group continued to contribute to Fund. Accordingly Sherwin-Williams was awarded the balance of its contributions under the Lyons assessment plus interest.

Arbitrator's Decision

To facilitate a meaningful review of the Award, this opinion sets out the Decision in some detail. To begin with, the arbitrator construed the disputed facts in favor of Fund. Because in his view Sherwin-Williams' other claims depended in large part on disputed facts (Decision at 4), the single issue before the arbitrator was whether the combination of (1) the stock sale, (2) Lyons' later cessation of operations and (3) Lyons failure to contribute to Fund after filing bankruptcy gave rise to a *complete* withdrawal for which Sherwin-Williams would be liable (Decision at 5).

But even on the assumption that Sherwin-Williams was legally responsible for Lyons' deficiencies under one or both of the theories presented by Fund, the arbitrator held that the sale of Lyons' stock should then be disregarded so that the pre-sale Sherwin-Williams controlled group (including Lyons) remained intact.[8] That would render Sherwin-Williams still financially responsible for whatever withdrawal liability was created by Lyons' failure to contribute to the fund (Decision at 6-7). Arbitrator Katz noted that this is exactly what occurred in another arbitration in New York that had dealt with the same sequence

---

[8] As this opinion later reflects, Fund is correct in characterizing that ruling as an impermissible misreading (or misapplication) of the statute.

of events involving Sherwin-Williams and Lyons but that had addressed the relationship between Sherwin-Williams and a different pension fund (*id.*).

But distinguishing the New York arbitration (in which the failure of Lyons to contribute to the fund there had been held to trigger a complete withdrawal), the arbitrator pointed out that Lyons was only one of several entities in the Sherwin-Williams controlled group that had been contributing to Fund. By contrast Dupli-Color, another of the Sherwin-Williams controlled group subsidiaries, continued to contribute to Fund throughout, even after the Lyons bankruptcy. Thus Lyons' cessation of contributions would leave Sherwin-Williams responsible only for a partial withdrawal because at least one other entity in the group continued making payments (Decision at 7). There could be no complete withdrawal, even assuming that Sherwin-Williams remained responsible for Lyons after the stock sale.

Fund sought to avoid that analysis and to establish a complete withdrawal by advancing a bifurcated approach. On the one hand, Fund argued that the instant preceding the stock sale should be the controlling moment for ascertaining the identity of the "employer" in order to decide whether Sherwin-Williams was still responsible for Lyons' later failure to contribute to the fund. On the other hand, Fund contended that the stock sale should be taken into account for the purpose of splitting up the Sherwin-Williams controlled group into (1) a new Sherwin-Williams controlled group (without Lyons) and (2) a new J.R.C./Lyons entity. That then would cause Lyons' cessation of contributions to result in a complete withdrawal, because Lyons would have been the sole contributor to Fund in the new "stand-alone" entity (Decision at 8).

Arbitrator Katz rejected Fund's approach, viewing its argument as both illogical and unsupported by authority (*id.*):

> There are fundamental problems with the Fund's argument. Its asymmetrical approach to the stock sale is neither logical, nor supported by any cited arbitral or judicial precedents. The Fund seeks to pick and choose the consequences which arise from the statutory disqualification of the stock sale. In effect, the Fund wishes the arbitrator to recognize the consequences which work to its advantage (the continuing financial liability of S-W), while disregarding those which work to its disadvantage (the continuation of the pre-sale S-W controlled group).

Because at least one other entity in the Sherwin-Williams controlled group was making contributions to Fund both when the stock sale occurred and afterwards,[9] the arbitrator found that Sherwin-Williams could have been liable only for a partial withdrawal if no sale had occurred and if Lyons had then failed (*id.*). In no event, the arbitrator reasoned, should this case be treated differently simply because there was a non-qualifying stock sale.

MPPAA in General

As first enacted in 1974, ERISA created the Pension Benefit Guarantee Corporation ("PBGC") to administer and enforce a pension plan termination insurance program under which employers were required to pay insurance premiums (*Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust for S. Cal.*, 113 S. Ct. 2264, 2272 (1993)). But under those original terms, the guaranty of basic benefits by multiemployer plans in the event of termination was not mandated to take effect until 1978 (*id.*). As the date for mandatory coverage approached, Congress recognized that employers might withdraw from weak plans to escape liability (*id.*). Fear-

---

[9] There was a dispute over the status of one other Sherwin-Williams subsidiary, but the statement in the text was concededly accurate as to Dupli-Color.

ing that the insurance system as originally conceived might be jeopardized by such an exodus, Congress postponed the mandatory guaranty date and requested that PBGC analyze the potential threat to multiemployer plans and suggest solutions (*id.*).

In 1980 Congress enacted MPPAA in response to the advice that it had received from the PBGC (*id.*). Its purpose was to hold employers accountable for their vested pension fund liabilities upon their withdrawal from multiemployer plans (*Bell Transit*, 22 F.3d at 707). As the Secretary of Labor testified before Congress (*Multiemployer Pension Plan Amendments Act of 1980: Hearings on H.R. 3904 Before Subcomm. on Labor-Management Relations of the House Comm. on Education & Labor*, 96th Cong., 1st Sess. 362 (1979)):

> [A]n employer that leaves the multiemployer pension plan would be required to pay its fair share of the plan's vested liabilities. The objective of this element is to discourage withdrawals and to provide a financial cushion for the plan which is not now provided by the present system because of the limitations of liability and the absence of any disincentive to withdraw.

Hence an employer that withdraws from a multiemployer pension plan is now held responsible for "a sum approximating the vested but unfunded benefits of the employer's employees" (*Santa Fe Pac. Corp. v. Central States Fund*, 22 F.3d 725, 726 (7th Cir. 1994), citing 29 U.S.C. §§ 1381 et seq.). Technically MPPAA charges the employer with the difference between the present value of vested benefits and the current value of the plan's assets (*Concrete Pipe*, 113 S. Ct. at 2272). That "withdrawal liability" not only protects other employers in the plan from having to pay for those benefits (*Santa Fe*, 22 F.3d at 727) but also operates to avoid the ultimate shifting of such costs to PBGC as the insurer under the plan (*Bell Transit*, 22 F.3d at 707).

To collect withdrawal liability, a plan first calculates the amount owed by a withdrawing employer (Sections 1382 and 1391) and then notifies the employer of the amount due (Section 1399(b)(1)). Any employer that wishes to challenge the assessment of liability may submit a request to the plan for review (Section 1399(b)(2)) and may initiate arbitration if dissatisfied with the results (Section 1401(a)(1)). Throughout the proceedings, however, the plan's determination of liability is presumed correct unless the party contesting the determination can establish by a preponderance of the evidence that the determination is unreasonable or clearly erroneous (Section 1401(a)(3)(A)).[10]

Not all employers who withdraw from a plan must pay withdrawal liability (*Bell Transit*, 22 F.3d at 707). *Connolly v. PBGC*, 475 U.S. 211, 225-26 (1986) teaches:

> The assessment of withdrawal liability is not made in a vacuum, however, but directly depends on the relationship between the employer and the plan to which it had made contributions. Moreover, there are a significant number of provisions in the Act that moderate and mitigate the economic impact of an individual employer's liability.

Thus, for example, Section 1398 provides that a mere change in corporate structure does not of itself trigger employer withdrawal liability. But it is also true that *no* transaction will be favored with an exemption where a principal purpose is the evasion or avoidance of withdrawal liability (Section 1392(c)).

Given the limited scope of the current issues, however, this opinion will join the arbitrator in his view that neither of those two sections is directly applicable to the trans-

---

[10] In the interim neither the request for review nor the demand for arbitration tolls the employer's duty to pay on the assessment (*Bell Transit*, 22 F.3d at 707).

actions at issue (though this Court cautions that it does not share the arbitrator's reading of those sections). With that background, this opinion cuts to the chase.

Liability for Complete Withdrawal

When issues of statutory interpretation are brought before a court, the appropriate place to begin is of course with the statutory language (*Bell Transit*, 22 F.3d at 710).[11] In that respect *Central States Fund v. Cullum Cos.*, 973 F.2d 1333, 1339 (7th Cir. 1992) repeats the message of *Central States Fund v. Bellmont Trucking Co.*, 788 F.2d 428, 433 (7th Cir. 1986):

> When Congress enacted the MPPAA, it "did not merely select a broad policy goal and instruct the courts to achieve that objective. Rather, Congress itself decided what rules, and exceptions to those rules, would best achieve its goals."

And to that end the words of the statute should normally be given their common meanings (*Smith v. United States*, 113 S. Ct. 2050, 2054 (1933)).

First among the relevant statutory provisions, Section 1383(a) sets out the instances in which a complete withdrawal occurs:

> For purposes of this part,[12] a complete withdrawal from a multiemployer plan occurs when an employer—

---

[11] *Trustees of Iron Workers Local 473 Pension Trust v. Allied Products Corp.*, 872 F.2d 208, 212-13 (7th Cir. 1989) thus looked to the plain language of the statute without regard to legislative history in deciding whether Section 1383(a)(2)'s determination that a complete withdrawal occurs when an employer "permanently ceases all covered operations under the plan" should be satisfied when the employer ceased "virtually all" covered operations.

[12] [Footnote by this Court] "This part" refers to the "Employer Withdrawals" portion of Subtitle E of the "Plan Termination Insurance" subchapter of Title 29—more specifically "this part" comprises Sections 1381 through 1405.

> (1) permanently ceases to have an obligation to contribute under the plan, or
>
> (2) permanently ceases all covered operations under the plan.

"Employer" is in turn defined in Section 1301(b)(1):

> For purposes of this subchapter,[13] under regulations prescribed by the corporation [PBGC], all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer.

Read together, those provisions make it clear "that trades and businesses under common control are to be treated as a single entity and are jointly and severally liable for each other's withdrawal liabilities" (Ronald Cooke, *ERISA Practice & Procedure* § 7.47, at 7-142 (1994) and cases cited there). To determine whether a complete withdrawal has occurred, "contributions of the entire commonly controlled group must be taken into account by the plan sponsor" (PBGC Op. 82-13, 1992 PBGC LEXIS 28, at *3 (Apr. 12); see also PBGC Op. 92-1, 1992 PBGC LEXIS 1, at *4-*5 (Mar. 30)).[14]

---

[13] [Footnote by this Court] "This subchapter" refers to the entire "Plan Termination Insurance" subchapter of Title 29: Sections 1301 through 1461.

[14] Absent compelling indications that the interpretation of a statute by the agency charged with its execution is wrong, courts may view such interpretations as definitive guides (over a quarter century ago *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969) characterized that as an already "venerable principle"). PBGC opinions are normally accorded the same deference that is shown to the decisions of other federal regulatory agencies (see *Robbins v. Pepsi-Cola Metropolitan Bottling Co.*, 636 F. Supp. 641, 654 n.23 (N.D. Ill. 1986)). And that should apply with particular force where PBGC (which might be deemed an interested party) has issued decisions that cut *against* finding liability for complete withdrawal.

Of course corporations in a parent-subsidiary relationship present the paradigmatic example of trades or businesses under common control. So if a subsidiary withdraws from a plan, its withdrawal liability (if any) can plainly be assessed against its parent (*Santa Fe*, 22 F.3d at 727).

Even though the two already-quoted provisions (Sections 1383(a) and 1301(b)(1)) speak to the concepts of "complete withdrawal" and "employer," they do not necessarily answer the question posed here: whether the complete withdrawal of an "employer" (in this instance Lyons and any commonly controlled post-stock-sale entities) can impose MPPAA liability on any of the other companies that were part of the pre-stock sale "employer" (in this instance Sherwin-Williams). On that subject both litigants (and the arbitrator) have sought to draw inferences from Sections 1392(c) and 1398:

§ 1392(c):

> If a principal purpose of any transaction is to evade or avoid liability under this part,[15] this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

§ 1398:

> Notwithstanding any other provision of this part,[16] an employer shall not be considered to have withdrawn from a plan solely because—
>
> 1. an employer ceases to exist by reason of—
>
> (A) a change in corporate structure described in section 1362(d) of this title, or

---

[15] [Footnote by this Court] As n. 12 indicates, "this part" comprises Section 1381 through 1405.

[16] [Footnote by this Court] *Ibid.*

(B) a change to an unincorporated form of business enterprise, if the change causes no interruption in employer contributions or obligations to contribute under the plan, or

2. an employer suspends contributions under the plan during a labor dispute involving its employees.

For purposes of this part, a successor or parent corporation or other entity resulting from any such change shall be considered the original employer.

Arbitrator Katz resolved the question identified in the preceding paragraph of the text by stating that if Fund's assertion about Sherwin-Williams having caused the drying up of Lyons' contributions by having sold Lyons' stock is to be accepted, the sale of stock should be disregarded for all purposes relating to withdrawal liability. With all respect, that is just wrong. Congress well knew how to mandate such a result when it wanted to—Section 1392 (c) shows that. But Section 1398 contains no such rule, and this Court cannot insert one where Congress has not.

Next, according to the arbitrator (Decision at 5):

> In the instant case, S-W's basic position is that its May 31, 1990 sale of Lyons' stock was qualifying under § 1398, and not subject to disqualification under § 1392.

It is difficult to tell from Sherwin-Williams' filings before this Court whether that accurately characterizes its position—but if it does, that too is wrong. Section 1398 just does not describe the transactions that have given rise to this litigation.

What controls here, however, is that in terms of the controlling statutory provisions it is *Fund* that is wrong.

There is no complete withdrawal under Section 1383(a) unless the statutory "employer" permanently ceases to have any contribution obligation or permanently ceases all covered operations under the relevant plan. And because that did not occur as to the entire Sherwin-Williams conglomeration that constituted the statutory "employer" under Section 1301(b)(1), and because Dupli-Color has always been part of that conglomeration and a contributor to Fund, no statutory "complete withdrawal" can be found here.

2 *Labor & Employment Arbitration* § 40.04[10], at 40-95 to 40-96 (Tim Bornstein & Ann Gosline eds., 1994) puts the statutory mandate simply:

> [A]ll commonly controlled entities must be taken into account in determining whether there has been a withdrawal. For example, there can be no complete withdrawal from a fund as long as any member of a commonly controlled group remains a contributing employer to that fund.

Penn Cent. Corp. v. Western Conference of Teamsters Pension Trust Fund, 863 F. Supp. 1131, 1134 (N.D. Cal. 1994) (emphasis added) makes the same point in an analogous context:

> Here, it is undisputed that G.K. Trucking, Marathon Steel, and Buckeye Gas were under the common control of Penn Central until the sale by Penn Central of Buckeye Gas to the Ferrell Group. Prior to that sale, the cessation of operations under the Plan by G.K. Trucking and Marathon Steel generated a withdrawal liability of $60,618 to the Plan. This sum was G.K. Trucking and Marathon Steel's proportional share of the Fund's vested benefit shortfall attributable to their employees and operations. *Complete withdrawal liability was not assessable, however, at the time these two subsidiary corporations permanently ceased oper-*

> *ations under the Plan because Penn Central, their parent and the "employer" under ERISA § 4001 (b)(1), continued to contribute to the Fund on behalf of Buckeye Gas.*

See also *Western Dominion Coal Co. & UMW 1950 & 1974 Pension Plans,* 6 Employee Benefits Cas. (BNA) 2353, 2369 (1985) (Gordon, Arb.).

Indeed, Fund's R. Mem. 14 n.7 (emphasis added) openly concedes that it urged a position contrary to its present one before one of this Court's colleagues in an unrelated case only two years ago:

> Sherwin-Williams is correct in noting that in *Santa Fe Pacific v. Central States,* 1992 U.S. Dist. Lexis 15159 (N.D. Ill. 1992), *reversed,* 22 F.3d 725 (7th Cir. 1994), the Pension Fund asserted that a non-qualifying stock sale resulted in a partial withdrawal (S-W 12/21/94 Memo, p. 17).[17]

While Fund is not legally precluded from arguing a different position in the matter before this Court, its current vigorous opposition to Arbitrator Katz's conclusion might perhaps be considered a bit suspect.

But what has been said to this point should not be misunderstood. Any syllogistic approach that is based solely on the two statutory provisions defining "complete withdrawal" and "employer" is somewhat simplistic in relation to the specific situation before this Court, a situation that so far as this Court is aware presents a question of first impression. It cannot be gainsaid that MPPAA does *not* speak in direct terms to the scenario that has been alleged by Fund—a scenario that must be credited

---

[17] [Footnote by this Court] Fund's sole attempt to distinguish *Santa Fe* is to argue that the technical assessment of partial as opposed to complete withdrawal in that case made little difference because the recovery sought under either theory would have been roughly the same.

as true on the present motions. And on its side Sherwin-Williams has done little more than to iterate and reiterate several wholly unpersuasive contentions, apparently in the hope that such repetition will take the place of careful analysis.

This Court has wrestled conceptually with what is to be treated as a given for current purposes: Fund's allegation that Sherwin-Williams' sale of Lyons' stock *caused* the ensuing collapse of Lyons as a Fund contributor. For purposes of analysis that allegation collapses the time interval between the stock sale and the cessation of contributions, so that in legal contemplation the situation is just as though Sherwin-Williams sold the Lyons stock and Lyons' Fund contributions ceased immedately. There is no question that Lyons' cessation of contributions resulted in a complete withdrawal from Fund by *Lyons* and its commonly-controlled group (the group created by the sale of stock to J.R.C.). And although Fund has not put the legal issue in these terms, the question then really becomes whether a parent company whose conduct has directly caused its subsidiary to trigger multi-million dollar MPPAA liability may itself be held liable for its own conduct in having done so.

So put, the question is not so simple. It demands an inquiry that stretches beyond the two statutory provisions that have been discussed at length here. What has clinched a negative answer to the question for this Court is that such an attempt to impose liability on Sherwin-Williams would really be *non*-statutory in nature, calling for the judicial recognition of an implied private cause of action where Congress has not expressly created one. And on that score the Supreme Court's increasing reluctance to recognize such implied rights of action should control here. In light of the intricate statutory structure of MPPAA, what was said in *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985) (citations omitted) about ERISA seems equally applicable to this case by parity of reasoning:

> The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted, however, provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a "comprehensive and reticulated statute."
>
> * * * *
>
> We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA. As we stated in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979): "[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement."

Accord, *Mertens v. Hewitt Associates*, 113 S.Ct. 2063, 2067 (1993), citing and quoting *Massachusetts Mut.* in part; and accord in the MPPAA context, *Bellmont Trucking*, 788 F.2d at 433; *Teamsters Pension Trust Fund v. Central Mich. Trucking, Inc.*, 857 F.2d 1107, 1111 (6th Cir. 1988).

In summary, Fund's assertion of Sherwin-Williams' complete withdrawal liability does not carry the day. Each side has recognized the potential for Sherwin-Williams' liability for *partial* withdrawal, but that liability is not yet ripe. Hence Sherwin-Williams prevails in the narrow scope of the current lawsuits.

Attorney's Fees

Sherwin-Williams asks this Court to shift to Fund the burden of Sherwin-Williams' attorney's fees and expenses both for the arbitration and for these actions. Because those claims involve differing standards of review, they will be dealt with separately.

Fees for the Arbitration

Arbitrator Katz was empowered to award reasonable attorney's fees to either party at the conclusion of the arbitration proceeding (Section 1401(a)(2)). For that purpose the relevant standard is set out in 29 C.F.R. § 2642.9(c):

> *Attorney's Fees.* The arbitrator may require a party that initiates or contests an arbitration in bad faith or engages in dilatory, harassing, or other improper conduct during the course of the arbitration to pay reasonable attorney's fees of other parties.

Here is what Arbitrator Katz said in refusing to shift fees (Decision at 12):

> Unlike the proceeding involving this Employer and the New York State Teamsters Fund, this proceeding has involved complex questions of multiple contributing entities within the S-W controlled group, and possible multiple triggers or events of withdrawal. In this context, questions as to whether and when withdrawals occurred, the nature of the withdrawals (complete or partial) and S-W's financial responsibility for any resulting liability, are hardly clear-cut.
>
> * * * *
>
> I find no basis for allocating attorney's fees and costs or the arbitrator's fees against the Fund. Each party shall be responsible for its own attorney's fees and costs and for half of the arbitrator's fee.

That plainly reflects the arbitrator's judgment that both parties had offered up good faith arguments for their competing approaches to determining withdrawal liability under MPPAA. Though clearly aware of Fund's earlier espousal of a different view in *Santa Fe* (Decision at 10), the arbitrator refused to find misconduct on Fund's part for advancing a novel position in the instant case. This Court will not overturn that decision.

Fees Before This Court

Section 1451(e) authorizes an award of reasonable attorney's fees and expenses to the prevailing party unless the losing party's position was "substantially justified" (*Construction Indus. Retirement Fund of Rockford v. Kasper Trucking, Inc.*, 10 F.3d 465, 469 (7th Cir. 1993)). *Bittner v. Sadoff & Rudoy Indus.*, 728 F.2d 820, 830 (7th Cir. 1984) first established that standard: [18]

> [W]e turn for a useful analogy to the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), which entitles a prevailing party in many types of suit against the government to a reasonable attorney's fee "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." These words create a modest presumption (modest because of the "special circumstances" exception) in favor of awarding reasonable attorney's fees to the winning party, plaintiff or defendant, unless the loser's position, while rejected by the court, had a solid basis—more than merely not frivolous, but less than meritorious.

---

[18] While *Bittner* dealt with Section 1132(g)(1) (applicable to conventional ERISA enforcement actions), *Continental Can Co. v. Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent) Pension Fund*, 921 F.2d 126, 127 (7th Cir. 1990) has confirmed the application of the same principle to actions brought under Section 1451(e).

It should be plain from all that has gone before that in these cases the parties have essentially been asking this Court to write on a clean slate. Neither has been able to adduce authority on the special circumstances posed in this case: not just the cessation of contributions by a subsidiary, but such a cessation caused directly by its parent's action in selling the subsidiary's stock so as to disable the subsidiary financially. What the arbitrator said in Decision at 12 (quoted earlier in this opinion) about the complexity and non-clear-cut nature of the questions dealt with here applies with at least equal force at this stage of the parties' dispute.

Conclusion

Fund's motion to vacate or modify the Award is denied, while Sherwin-Williams' motion to enforce the Award is granted. Sherwin-Williams' additional motions (1) to modify the Award and (2) to obtain an award of attorney's fees and expenses relating to these actions are denied. Both these actions have now been dealt with in their entirety.

/s/ Milton I. Shadur
MILTON I. SHADUR
Senior United States District Judge

Date: March 15, 1995

APPENDIX C

AMERICAN ARBITRATION ASSOCIATION

MULTI-EMPLOYER PENSION PLAN ARBITRATION TRIBUNAL

Case No. 51 621 0009 91 V

THE SHERWIN-WILLIAMS COMPANY

-and-

CENTRAL STATES, SOUTHEAST & SOUTHWEST AREAS PENSION FUND

ARBITRATION DECISION

Re: Motion to Dismiss or for Summary Judgment

Arbitrator: Lawrence E. Katz, Esq.

BACKGROUND

Relevant background facts have already been set forth in the Interim Decision of December 9, 1993, regarding the scope of the proceeding. In that Decision, the arbitrator concluded that this proceeding would include the complete withdrawal issue(s) attendant to Lyons' cessation of contributions, as well as any lesser-included partial withdrawal issues involving the Sherwin-Williams (S-W) controlled group, attributable to Lyons. But it was further held that any issues involving Terminal's cessation of contributions, including any partial withdrawals at-

tributable thereto (in whole or in part) would be excluded from this proceeding.

After the issuance of the Interim Decision, the matter was scheduled for an evidentiary hearing from January 18-21, 1994. In late December, the Employer sought a postponement of the hearing to enable its expert witness(es) to further prepare with respect to certain "equitable solvency" issues attendant to the stock sale, and, as more relevant hereto, to prepare the instant Motion to Dismiss, based on its contention that on any state of facts, there had been neither a complete withdrawal or a partial withdrawal. The Fund objected to the postponement. It also noted that if its complete withdrawal arguments were rejected, it intended to argue that Lyons' cessation of contributions gave rise to a "70% contribution decline" partial withdrawal (under 29 U.S.C. § 1385 (a)(1)); however, it did not intend to argue that there had been a "partial cessation of contributions" partial withdrawal (under 29 U.S.C. § 1385(a)(2)).[1]

By letter ruling dated January 4, 1994, the arbitrator granted the requested postponement, noting in pertinent part that "there is one scenario under which there may be no immediate need for such an evidentiary hearing—

---

[1] As indicated in the Interim Decision, p. 2, n. 1, the Fund would not have been able to calculate the amount of withdrawal liability attributable to a "partial cessation of the contribution obligation" for at least another year (after December 31, 1991); and it would not have been able to calculate the amount of withdrawal liability attributable to a "70%-decline" partial until after the end of the so-called "three-year testing period" (December 31, 1993).

Apparently, the Fund believes that the requirements for a 70%-decline partial were met by December 31, 1993. Thus, it indicated its intention to proceed under such a theory of liability. But it has declined to pursue the more immediate types of partial withdrawals, set forth in § 1385(b)(2)(A)(i) and (ii) (so-called "bargaining agreement cessation" and "facility cessation," respectively), in seeming recognition of the fact the that employer (*i.e.*, the S-W controlled group) had not met the stautory prerequisites with respect to the ongoing performance of covered work.

i.e., if the 70% contribution decline issue is not properly included in this proceeding, and if there has been no complete withdrawal." The arbitrator further concluded that the 70% decline issue was not included within the scope of the instant proceeding, which arose out of the Fund's January 16, 1991 assessment (whereas, as noted above, a 70% decline partial withdrawal assessment could not be made until the end of the three-year testing period —*i.e.*, on or after December 31, 1993).

Thus, the only question which remains for purposes of the instant "Motion to Dismiss or, in the Alternative, Motion for Summary Judgment" is whether the facts, construed most favorably to the Fund,[2] could be viewed as giving rise to a complete withdrawal, rather than a partial withdrawal. As indicated in the January 4, 1994 letter ruling, for purposes of that Motion, we must assume *arguendo* that S-W remained responsible for Lyons, notwithstanding the sale of stock, either because the sale of stock caused the subsequent interruption in employer contributions to the Fund, so that it would be non-qualifying under 29 U.S.C. § 1398(1); or, because it was intended to "evade or avoid" withdrawal liability under 29 U.S.C. § 1392(c). *See, e.g., Sherwin-Williams Co. & N.Y. State Teamsters Pension Fund*, 17 EBC 2725 (Gertner, Arbr., February 7, 1994), *app. pending* (finding in favor of a sister Fund, which had claimed that one of the principal purposes of S-W's sale of the Lyons stock was to evade or avoid withdrawal liability under § 1392(c));[3] *see also*,

---

[2] "For purposes of a motion to dismiss, we accept the plaintiff's well-pleaded allegations as true and view them, together with the reasonable inferences to be drawn therefrom, in the light most favorable to the plaintiff." *Banner Industries, Inc. v. Central States Pension Fund*, 657 F. Supp. 875 (N.D. Ill 1987) (citation omitted).

[3] The arbitration involving the New York Fund appears to have been somewhat less complicated than that herein in that no argument appears to have been made that the stock sale was non-qualifying under 29 U.S.C. § 1398(1). Also, since Lyons appears to have been the only member of the alleged S-W control group

Santa Fe Pacific Corp. v. Central States Pension Fund, 22 F. 3d 725, 18 EBC 1010 (7th Cir. 1994) (finding parent company liable for subsidiary's withdrawal liability, where leveraged stock sale of subsidiary had a principal purpose of evading or avoiding that liability); *Banner Industries, Inc. & Central States Pension Fund*, 11 EBC 1149 (Graham, Arbr. 1989), *vacated by settlement*, 12 EBC 1992 (1990) (finding parent company liable for subsidiary's withdrawal liability, where ESOP stock sale transaction had a principal purpose of evading or avoiding that liability).

Notwithstanding the above-noted principle of construing any disputed facts in the light most favorable to the Fund, the Employer has still sought to argue that the instant sale of stock was qualifying, rather than nonqualifying under § 1398(1); and therefore, that there can be no finding that evasion or avoidance of liability was a principle purpose of the transaction under § 1392(c); and therefore, that no withdrawal may be deemed to have occurred at the time of the sale, and that any subsequent withdrawal is no longer the responsibility of S-W.

However, I do not believe these issues are capable of summary determination. Rather, they depend in large part, upon disputed facts and the inferences which may reasonably be drawn therefrom. Moreover, even if the Employer might prevail under § 1398 itself, the sale might still be ignored if the Fund's "evade/avoid" claim under § 1392(c) were upheld (as in the above-cited cases involving the New York Fund, as well as *Santa Fe Pacific* and *Banner*). Thus, our earlier analysis remains applicable. We must assume for purposes of the instant

---

making contributions to the New York Fund, when its contributions ceased, a complete withdrawal would have occurred, rather than the partial withdrawal(s) which may have occurred with respect to the Central States Fund (in view of the ongoing contributions which other S-W controlled group entities were making to the instant Fund).

Motion that the Fund would be able to marshall facts which will enable it to prevail on at least one of the above-noted theories, so that S-W would remain responsible for Lyons' cessation of operations and/or contributions, notwithstanding the sale of stock.

Thus, the one issue which remains for purposes of this Motion is whether, under any state or assumed facts, the May 31, 1990 sale of stock and/or Lyons' subsequent cessation of operations and/or contributions could have given rise to a complete withdrawal (as the Fund argues); or whether it could only have given rise to a partial withdrawal (as the Employer argues).

DISCUSSION AND DECISION

When there is a qualifying sale of stock of a member of controlled group of companies (under § 1398), which is not subject to disqualification under the "evade/avoid" clause (§ 1392), the pre-sale controlled group ceases to exist. Instead it is treated as having been split up into two new entities—(1) a new version of the original controlled group (which would now exclude the company whose stock was sold); and (2) the sold company (or the controlled group to which it now belongs, if any).

In the instant case, S-W's basic position is that its May 31, 1990 sale of Lyons' stock was qualifying under § 1398, and not subject to disqualification under § 1392. Thus, it maintains that on and after May 31, 1990, the pre-sale S-W controlled group (which included Lyons) ceased to exist. Instead, there was (1) a new, post-sale S-W controlled group (which excluded Lyons) and (2) Lyons/JRC (either as a "stand-alone" entity or as part of a multi-entity JRC controlled group[4]). Thus, any

[4] As far as appears from the evidence of record, following the sale Lyons would have been a stand-alone entity. It does not appear that there were any other entities within the JRC group making contributions to the instant Fund. The cessation of operations/contributions of such a stand-alone entity would give rise to a complete withdrawal.

subsequent withdrawal on the part of Lyons would be the responsibility of Lyons/JRC and not S-W. *See, e.g., Philadelphia Teamsters Pension Fund v. Central Michigan Trucking, Inc.*, 857 F. 2d 1107 (6th Cir. 1988) (holding that parent corporation which spun-off subsidiary in a qualifying stock sale under § 1398, was not liable for subsidiary's withdrawal, occurring some four years later).

Due to the apparent insolvency of Lyons/JRC, as well as its view of the underlying stock sale, the Fund would prefer to look to the relatively deeper pockets of S-W for payment; hence, the November, 1990 assessment to Lyons was re-issued to S-W in January, 1991. But in order for S-W to be financially responsible for the Lyons withdrawal, the Fund has alleged, as indeed it must, that the stock sale was non-qualifying under § 1398 and/or that one of its primary purposes was to evade or avoid withdrawal liability under § 1392. If the Fund prevails on either of these theories, then (1) the stock sale would be disregarded; (2) the pre-sale S-W controlled group (including Lyons) would remain intact; and (3) S-W would remain financially responsible for Lyons' contribution history and/or any attendant withdrawal liability.

This is precisely what occurred in the above-cited arbitration involving S-W and the New York Fund. However, as noted above (p. 4, n. 3), since Lyons appears to have been the only entity within the S-W controlled group making contributions to the New York Fund, its cessation of operations gave rise to a complete withdrawal (for which S-W remained responsible).

In contrast, Lyons was only one of several S-W controlled group entities making contributions to the Central States Fund. Thus, if Lyons ceased operations and contributions, but one or more of the remaining S-W entities continued to make contributions, it would appear that a partial withdrawal, rather than a complete withdrawal would have occurred (for which S-W would be responsi-

ble). *See*, Jaffe & Nagle, *MEPPAA Withdrawal Liability*, 2 Labor & Employment Arbitration, § 40.04[10] (Bornstein & Gosline, eds. 1993) at pp. 40-95–40-96 (indicating ". . . there can be no complete withdrawal from a fund as long as any member of a commonly controlled group remains a contributing employer to that fund"). *See also*, *Robbins v. Pepsi-Cola Metropolitan Bottling Co.*, 636 F. Supp. 641, 653, nn. 19-20 (N.D. Ill. 1986) (indicating that the use of the controlled group concept may produce different results than those obtained if each separate entity is considered on a corporation-by-corporation basis; thus, activities which might constitute a complete withdrawal for a stand-alone corporation, might only constitute a partial withdrawal if that corporation were part of a controlled group).

The Fund seeks to avoid the above analysis by arguing that the Lyons stock sale should be disregarded for purposes of determining S-W's financial responsibility, but that it should be taken into account for purposes of determining whether a partial or compete withdrawal occurred. In this latter regard, the Fund wants the sale to be recognized for purposes of splitting up the pre-sale S-W controlled group, so that a new Lyons/JRC entity will be considered to exist. Then, with such a split-off having been recognized, the Fund maintains that the ensuing cessation of operations of the new, "stand-alone" entity (*see*, n. 4, *above*), would give rise to a complete withdrawal rather than a partial withdrawal. Moreover, under this scenario, once the split-off Lyons/JRC group is recognized as an independent entity, the complete withdrawal claim is not defeated due to the continuation of contributions from one other entity (Dupli-Color) within the now-separate S-W controlled group.

There are fundamental problems with the Fund's argument. Its asymmetrical approach to the stock sale is neither logical, nor supported by any cited arbitral or judicial precedents. The Fund seeks to pick and choose

the consequences which arise from the statutory disqualification of the stock sale. In effect, the Fund wishes the arbitrator to recognize the consequences which work to its advantage (the continuing financial liability of S-W), while disregarding those which work to its disadvantage (the continuation of the pre-sale S-W controlled group).

On the facts presented herein with respect to the S-W controlled group as it existed prior to May 31, 1990 (when the stock sale occurred), other entities were making contributions to the instant Fund (Dupli-Color and/or Terminal Garage [5]). Thus, if there had never been a sale of the Lyons stock, the cessation of the Lyons operation and/or contributions in October, 1990 would only have led to a partial withdrawal; but it would not have led to a complete withdrawal of the S-W controlled group. It makes little sense for the result to be different simply because a non-qualifying sale of the Lyons stock occurred on or about May 31, 1990.

When a stock sale is non-qualifying (under § 1398 and/or § 1392), the pre-sale controlled group will not be considered to have been split-up; rather, it will be considered to have remained intact. This continuation of the control group has at least two consequences. First, as the Fund recognizes, the seller would continue to be financially responsible for any withdrawal liability arising out of a cessation of operations or contributions of the entity which was sold. Second, although the Fund declines to recognize it, since the intended splitting-off of the sold entity cannot be recognized, that entity effectively remains part of the controlled group; thus, in determining whether the sold entity's cessation of operations or contributions would lead to a partial or complete withdrawal, one would have to consider it as part of the overall controlled group.

---

[5] As indicated in the Interim Decision (p. 4), there was a cessation of operations and contributions involving Terminal in November or December, 1990, after Teamsters Local 507 was decertified as the bargaining agent.

Notwithstanding the above-noted logic, the Fund argues in this proceeding that "the *only* type of withdrawal that can result by virtue of the failure of a transaction to qualify for an exemption under § 1398 is a complete withdrawal" (Opposition Memorandum, p. 2). It further argues that the sale itself (on May 31, 1990), rather than the cessation of operations and contributions (some 4-5 months later), constituted the event which triggered the instant withdrawal.

With respect to the latter argument, even if we assume, as the Fund has argued, that the stock sale was a "formula for disaster" which was a substantial cause of Lyons' subsequent demise, it appears questionable whether the sale itself would have resulted in a withdrawal. But even if a withdrawal occurred at that time, it could not be considered a complete withdrawal unless Lyons had somehow become a stand-alone entity, separate and independent from the S-W controlled group (since one or more other entities within the control group continued to contribute to the Fund). However, this independence on Lyons' part could only be achieved if, contrary to the Fund's other arguments, a qualifying stock sale, rather than a non-qualifying stock sale, had occurred. (Moreover, as indicated previously, if such independence had been achieved, it would have had the undesirable consequence, from the Fund's point of view, of relieving S-W of its financial responsibility for Lyons).

With respect to the Fund's former argument, it is conceivable that a subsequent cessation of operations/contributions on the part of an entity sold in a non-qualifying stock sale would give rise to a complete withdrawal, *if* no other entities within the controlled group were making contributions to the fund. This appears to have been the situation in the above-cited arbitration involving S-W Lyons and the New York Teamsters Fund (p 3, above); *see also, Banner Industries arbitration*, p. 4, *above*; *prior proceedings*, cited *above*, p. 2, n. 3 (the District Court

indicated at p. 877, n. 3, that the parties agreed that any withdrawal which occurred was a complete withdrawal).

However, where, as here, the controlled group includes other contributing entities in addition to the entity sold in the non-qualifying stock sale, the cessation of that entity's operations/contributions would only give rise to a partial withdrawal. Moreover, the instant Fund appears to have recognized this point in the arbitration and litigation involving the Santa Fe Pacific Corporation (SFPC) controlled group (cited *above*, p. 4). *See also*, prior proceedings, 1992 U.S. Dist. LEXIS 15159 (N.D. Ill. 1992).

In that case, the pre-sale commonly-controlled group consisted of at least two subsidiary entities which made contributions to the Fund—Santa Fe Terminal (Terminal)[6] and Santa Fe Trails Transportation Company (SFTT). In 1984, SFPC sold SFTT in a leveraged stock sale (but it retained Terminal, which, appears to have continued making contributions to the Fund). SFTT went backrupt a year later. Although the exact nature of the Fund's assessment is not clear from the reported decisions, it appears that one of its theories before the District Court (if not the arbitrator) was that a non-qualifying sale of the SFTT stock would have left SFPC liable for the partial withdrawal attributable to a 70% contribution decline within the SFPC controlled group (seemingly due to SFTT's cessation of contributions; however, a decline in Terminal's contributions may have been a contributing factor). 1992 U.S. Dist. LEXIS 15159, pp. 4-5. This suggests that even the instant Fund has recognized that partial withdrawals, as well as complete withdrawals, may occur when there is a non-qualifying stock sale of one entity within a commonly-controlled group.

---

[6] This Santa Fe Terminal entity shares a common word with the Terminal Garage entity which was part of the S-W controlled group; but other than that, S-W's Terminal entity and the SFPC's Terminal entity are completely separate.

CONCLUSION

Even when the facts are construed most favorably to the Fund, they do not permit the conclusion that a complete withdrawal occurred. Rather, to the extent that S-W is claimed to be responsible for the withdrawal liability arising out of the Lyons stock sale and/or Lyons' cessation of operations and contributions, that is because the pre-sale S-W controlled group is considered to have remained intact, without the split-off of Lyons being recognized Since no complete withdrawal occurred, the instant Motion to Dismiss or For Summary Judgment must be granted.

Contrary to the Employer's arguments, however, this conclusion does not mean that the Fund's January, 1991 assessment was frivolous or careless. Unlike the proceeding involving this Employer and the New York State Teamsters Fund, this proceeding has involved complex questions of multiple contributing entities within the S-W controlled group, and possible multiple triggers or events of withdrawal. In this context, questions as to whether and when withdrawals occurred, the nature of the withdrawals (complete or partial) and S-W's financial responsibility for any resulting liability, are hardly clear-cut.

In view of the instant ruling, the Fund will not have the opportunity in this proceeding to prove its claim that S-W remained financially responsible for Lyons. However, as indicated in the letter ruling of January 4, 1994 (p. 2), the Employer will have to answer that claim in one of the proceedings involving the various members of the S-W controlled group.

Thus, while the granting of this motion to dismiss means that the Fund must return those portions of the assessment which it has collected (plus interest),[7] I find no basis for

---

[7] To the extent some of the subsequent assessments involving the S-W controlled group may have been deemed to overlap the instant

allocating attorney's fees and costs or the arbitrator's fees against the Fund. Each party shall be responsible for its own attorney's fees and costs and for half of the arbitrator's fee.

/s/ Lawrence E. Katz
LAWRENCE E. KATZ, ESQ.
Arbitrator

Newton, Mass.
September 12, 1994

---

assessment, it appears that the Fund may have suspended the Employer's obligation to pay the latter assessments, pending the conclusion of this proceeding. If so, rather than refunding the Employer's payments, it may be appropriate for them to be applied towards the subsequent assessment.

APPENDIX D

82-4

[PBGC Logo] § 4218(1)(A)

Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington, D.C. 20006

[Feb. 10, 1982]

Re: Opinion Letter Regarding Withdrawal Liability Under the Multiemployer Pension Plan Amendments Act of 1980

We have received your letter in which you asked the Pension Benefit Guaranty Corporation ("PBGC") to rule on several issues arising under the provisions of the Multiemployer Pension Plan Amendments Act of 1980 (the "Act") as they apply to the transactions described in your letter and certain provisions which you propose to include in the sales agreement between the parties involved in those transactions. (Section references hereinafter are to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, as amended by the Act).

It is clear under the Act that the initial responsibility for determining whether any particular action constitutes a withdrawal from a multiemployer plan, and the amount of any liability resulting therefrom, lies with the plan sponsor. The Act further provides that any disputes between a plan sponsor and an employer on these issues are to be resolved first through arbitration and then, if necessary, in the courts. Given this scheme for enforcement of the Act, it would be inappropriate for the PBGC to interject itself in such a determination by issuing an opinion on the application of the law to these particular transactions. The PBGC,

however, will continue its practice of answering legal questions regarding the Act.

In that regard we point out that the sale by a parent corporation of the stock of a subsidiary corporation presents a question of statutory interpretation that we feel is appropriate to address. The legislative history to the Act contains the following example which indicates that there is no withdrawal liability solely as a result of a sale by a parent of stock of a subsidiary which was obligated to contribute to a multiemployer plan and continues such contributions after the sale:

> "The bill treats an employer as withdrawing from a multiemployer plan when the employer (1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan. A withdrawal does not occur, however, where an employer ceases to exist merely by reason of a change in form or structure, as long as the employer is replaced by a successor employer and there is no interruption in the successor employers' contributions to the plan or obligation to contribute under the plan. A group of trades or businesses under common control is treated as a single employer. For example, if P Corporation owns 100 percent of the stock of S Corporation, a subsidiary that has an obligation to contribute to a multiemployer plan on behalf of its employees, the controlled group consisting of P and S would be considered an employer with an obligation to contribute to the plan. If P sells all of its interest in S to an unrelated party, the controlled group consisting of P and S would cease to exist. However, if S continues to have an obligation to contribute to the plan, no withdrawal would be considered to have taken place merely because of the change in ownership of S." 126 Cong. Rec. S10,115 (daily ed. July 29, 1980) and

> H.R. Rep. No. 96-869, Part II, 96th Cong., 2nd Sess. 162 (1980), reprinted in [1980] U.S. CODE CONG. & AD. NEWS 3005-6. (emphasis supplied).

This example is an obvious reference to section 4218(1)(A) of ERISA which provides that an employer shall not be considered to have withdrawn from a plan solely because the employer ceases to exist by reason of "a change in corporate structure described in section 4062(d)" as long as no interruption in employer contributions or obligations to contribute under the plan occurs. Thus Congress clearly intended that a sale of stock of a subsidiary corporation is such a change in form of structure and that under section 4218 a withdrawal from a multiemployer plan does not occur when a parent sells the stock of a subsidiary corporation that contributes to a multiemployer plan and such contributions continue after the sale.

If you have any questions or wish to discuss these matters further, please contact * * * of this office at (202) 254-4895.

Sincerely,

HENRY ROSE
General Counsel

82-17

§ 4602(d)
4204
4212(c)

[PBGC Logo]

Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington, D.C. 20006

[26 May 1982]

Re: Opinion Letter Regarding Provisions of the Multiemployer Pension Plan Amendments Act of 1980

We have received your letter in which you asked the Pension Guaranty Corporation ("PBGC") to give advice on an issue arising under the provisions of the Multiemployer Pension Plan Amendments Act of 1980 (the "Act") as they apply to the transactions described in your letter. (Section references hereinafter are to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, as amended by the Act).

It is clear under the Act that the initial responsibility for determining whether any particular action constitutes a withdrawal from a multiemployer plan, and the amount of any liability resulting therefrom, lies with the plan sponsor. The Act further provides that any disputes between a plan sponsor and an employer on these issues are to be resolved first through arbitration and then, if necessary, in the courts. Given this scheme for enforcement of the Act, it would be inappropriate for the PBGC to interject itself in such a determination by issuing an opinion on the application of the law to particular transactions. The PBGC, however, will continue in practice of answering general interpretive questions regarding the Act.

The applicability of the sale of assets provisions of the Act to the sale of the stock of a corporation presents such a general interpretative question. Section 4204, the sale of assets provision, applies only when there is a complete or partial withdrawal of an employer. The legislative history to the Act contains the following excerpt which indicates that there is no withdrawal of an employer solely as a result of a sale of stock of a corporation which was obligated to contribute to a multiemployer plan and which continues such contributions after the sale:

> "The bill treats an employer as withdrawing from a multiemployer plan when the employer (1) permanently ceases to have an obligation to contribtue under the plan, or (2) permanently ceases all covered operations under the plan. A withdrawal does not occur however, where an employer ceases to exist merely by reason of a change in form or structure, as long as the employer is replaced by a successor employer and there is no interruption in the successor employer's contributions to the plan or obligation to contribute under the plan". 126 Cong. Rec. S10, 115 (daily ed. July 29, 1980) and H.R. Rep. No. 96-869, Part II, 96th Cong., 2nd Sess. 162 [1980], reprinted in [1980] U.S. CODE CONG. & AD NEWS 3005-6. (emphasis supplied).

This excerpt has reference to Section 4218(1)(A) of ERISA which provides that an employer shall not be considered to have withdrawn from a plan solely because the employer ceases to exist by reason of "a change in corporate structure described in section 4062(d)" as long as no interruption in employer contributions or obligations to contribute under the plan occurs. Thus, Congress indicated that a sale of stock of a corporation is such a change in form or structure and that under Section 4218 a withdrawal from a multiemployer plan does not occur when the stock of a corporation that contributes to a

multiemployer plan is sold and such contributions continue after the sale. Therefore, if Section 4218 applies and an employer is not considered to have withdrawn from a plan because of a change in corporate structure described in Section 4062(d), then Section 4204, the sale of assets provision, does not apply.

Under the facts of the case you describe, the purchase of all the stock of * * * by * * * is a change in corporate structure described in Section 4062(d). Therefore, there is no withdrawal and Section 4204, the sale of assets provisions, does not apply.

Note that under Section 4212(c), if a principal purpose of any transaction is to evade or avoid liability under Part I of Subtitle E of Title IV of ERISA, that part shall be applied (and liability shall be determined and collected) without regard to such transaction.

Please note that we are not expressing an opinion as to the consequences of the subsequent closing of the Quinn terminal by Maislin. The plan sponsor must determine whether this action is a complete or partial withdrawal and if so, the consequences of such a withdrawal.

If you have any questions or wish to discuss the matter further, please contact * * * of this office at (202) 254-3010.

Sincerely,

HENRY ROSE
General Counsel

82-40

§ 4062(d)
§ 4203
§ 4204
§ 4218

[PBGC Logo]

Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington, D.C. 20006

[Dec. 27, 1982]

This in response to your recent letter to Edwin Jones, regarding section 4218 of the Multiemployer Pension Plan Amendments Act of 1980, which amended the Employee Retirement Income Security Act of 1974. Your letter poses the question whether section 4218 of the Act shields an employer from withdrawal liability in a sale of assets where the seller's name, plant, employees, and inventory are simply taken over and continued by the purchaser. You state that the purchaser has continued to contribute to the multiemployer pension plan on behalf of all of the seller's unit employees except one. The plan has asserted that the seller has "withdrawn" from the plan, and is claiming withdrawal liability in connection with the event. You assert that the purchaser is a "successor" within the meaning of section 4218 of the Act and should be deemed the original employer. In your view, no withdrawal has occurred.

Under section 4203, a withdrawal occurs when an employer permanently ceases to have an obligation to contribute under the plan, or permanently ceases all covered operations under the plan. Under the facts you describe, and assuming that the seller does not continue to contribute to the plan on behalf of employees or operations in which it has an ownership interest of 80% or more, the selling employer has permanently ceased to have an obligation to contribute under the plan. Congress recognized in section 4204 of the Act, however, that where

a purchaser in an arms-length bona fide sale of assets continues to contribute to the plan on behalf of substantially the same contribution base units, and assumes the contribution history (and thereby the liability history) of the seller for the year of the sale and the preceding four years, the plan is not harmed, and therefore no withdrawal should occur. Accordingly, section 4204 provides that where the requisite conditions of that section are met, no withdrawal shall occur.

You rely instead on section 4218. In our view, this reliance is misplaced. Section 4218 provides that a withdrawal shall not occur if an employer ceases to exist by reason of a change in corporate structure described in section 4062(d) or a change to an unincorporated form of business, so long as there is no interpretation of employer contributions or obligations under the plan. The kinds of corporate restructuring referred to in section 4062 (d) are reorganizations which involve "a mere change in identity, form or place of organization, a liquidation into a parent corporation, or a merger, consolidation or division. These types of restructuring are inapposite to the facts of the case you present. In the situations described in section 4218, the entity contributing to the plan after the transaction is considered to be the same as the entity contributing prior to the transaction. Consequently, the entity after the sale is responsible for the allocable unfunded vested benefits for years both before and after the transaction. In your case however, the seller's obligation to the plan would totally cease as of the date of the sale. In this situation, Congress intended the seller to pay his allocated share of the plan's unfunded vested benefits, i.e., that share which was accrued during his participation in the plan. The purchaser has no obligation for this past liability and is treated as a new employer contributing to the plan with respect to the transferred operations. Thus, unless the seller is considered to have withdrawn from the plan, the seller's share of the plan's unfunded vested benefits would fall on the remainder of the con-

tributing employers. This is precisely the result Congress sought to avoid with the passage of the Multiemployer Act.

The PBGC has issued a regulation governing the exemption procedures under section 4204 and a class exemption which may be relevant to your facts. Should the seller and purchaser agree to comply with the terms of section 4204, withdrawal liability on the seller might be avoided. Copies of these documents are enclosed.

I hope this information has been helpful. If I can be of further assistance to you, please do not hesitate to contact me.

Sincerely,

HENRY ROSE
General Counsel

Enclosures

83-11

§ 4062(d)
4203
4205
4218

[PBGC Logo]

Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington, D.C. 20006

[May 16, 1983]

This responds to your recent letter requesting a ruling regarding withdrawal liability under Sections 4203, 4205 and 4218 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1301 *et seq.* (1976) (amended by Pub. L. No. 96-364 (1980)) ("ERISA"). Specifically you wish to know if an employer ("A") who contributes to a multiemployer plan withdraws from the plan as a consequence of forming a wholly-owned subsidiary ("B") which assumes A's obligations to the plan for the same operations and employees for which A was obligated to contribute.

Under the Act the initial responsibility for determining whether any particular action constitutes a withdrawal from a multi-employer plan, the amount of any liability resulting therefrom, and the identity of the liable employer lies with the plan. The Act further provides that any dispute between a plan and an employer on these issues are to be resolved first through arbitration, subject to review in the courts. Given this scheme for enforcement of the Act, the PBGC prefers not to interject itself in such determinations by issuing an opinion on the application of the law to the particular transactions you describe. The PBGC, however, will continue its practice of answering general interpretive questions regarding the Act.

Section 4218 provides that a withdrawal shall not occur solely because an employer ceases to exist by reason of a

change in corporate structure described in Section 4062 (d) as long as there is no interruption of employer contributions or obligations under the plan. The kinds of corporate restructuring referred to in Section 4062(d) are changes which involve (1) "a mere change in identity, form, or place of organization," (2) "a liquidation into a parent corporation," and (3) a merger, consolidation, or division." In our view the creation of a subsidiary corporation is a transaction described in Section 4062(d).

I hope this response is helpful to you.

Sincerely,

HENRY ROSE
General Counsel

84-7

§ 4001(b)
4203
4212(c)

[PBGC Logo]

Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington, D.C. 20006

[Dec. 20, 1984]

We have your letter raising several issues arising under the provisions of the Multiemployer Pension Plan Amendments Act of 1980 (the "Act").

Your first question concerns whether a withdrawal from a multiemployer pension plan will occur when corporation X organizes a wholly-owned subsidiary corporation Y and transfers to it all of the assets of one of its divisions. Section 4203 of ERISA provides that a withdrawal from a multiemployer plan has occurred when an *employer* permanently ceases to have an obligation to contribute under the plan, or permanently ceases all covered operations under the plan. (Section references herein are to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, as amended by the Act). Section 4001(b) defines an "employer" to include all trades or businesses under common control, and the PBGC's regulation on trades or businesses under common control, 29 C.F.R. Part 2612, provides that "trades or businesses which are under common control" has the same meaning as in Section 414(c) of the Internal Revenue Code ("IRC") and the regulations issued thereunder. Accordingly, if certain entities, such as X and Y, are under common control as defined in Section 414(c) of the IRC, they constitute the "employer" for purposes of Section 4203 of ERISA and no withdrawal will have occurred as a result of a transfer of assets from X to Y.

Your second question concerns the sale by X of all of the stock in its subsidiary corporation Y to your client A, an unrelated corporation which continues contributions to the plan on behalf of Y. You advise that neither X nor A has made any other contributions to the plan; nor does either intend to make other contributions to the plan. You ask whether, as a result of the stock sale, X and Y would incur withdrawal liability under ERISA.

It is clear that Congress intended that no withdrawal occur solely because a parent employer sells the stock of a subsidiary, so long as the subsidiary continues to make its contributions to the plan. The legislative history to the Act contains the following analysis:

> A group of trades or businesses under common control is treated as a single employer. For example, if P Corporation owns 100 percent of the stock of S Corporation, a subsidiary that has an obligation to contribute to a multiemployer plan on behalf of its employees, the controlled group consisting of P and S would be considered an employer with an obligation to contribute to the plan. If P sells all of its interest in S to an unrelated party, the controlled group consisting of P and S would cease to exist. However, if S continues to have an obligation to contribute to the plan, no withdrawal would be considered to have taken place merely because of the change in ownership of S. 126 Cong. Rec. S10,115 (daily ed. July 29, 1980) and H.R. Rep. No. 96-869, Part II, 96th Cong., 2nd Sess. 162 (1980), reprinted in [1980] U.S. CODE CONG. & AD NEWS 3005-6.

Therefore, the sale of stock of Y to A does not effect a withdrawal, as long as Y continues to make its contributions to the plan.

Finally, with regard to the transaction you describe, we note that under Section 4212(c), if a principal purpose

of any transaction is to evade or avoid liability under Part 1 of Subtitle E of Title IV of ERISA, that part shall be applied (and liability shall be determined and collected) without regard to such transaction.

Sincerely,

/s/ Henry Rose
HENRY ROSE
General Counsel

[PBGC Logo] 92-1

Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington, D.C. 20006-1860

[Mar. 30, 1992]

Re:

I write in response to your letter requesting the opinion of the Pension Benefit Guaranty Corporation ("PBGC") in regard to calculating liability for a complete or partial withdrawal under Sections 4203 and 4205 of the Employee Retirement Income Security Act of 1974 ("ERISA"), *as amended*, 29 U.S.C. §§ 1383 and 1385 (1989). Specifically, your question concerns the calculation of withdrawal liability in a situation where several members of a controlled group of corporations have an obligation to contribute to the same multiemployer pension plan and the controlled group members are sold or liquidated in a series of transactions.

As you the aware, Section 4221 of ERISA provides that disputes between a plan sponsor and an employer on issues concerning withdrawal and withdrawal liability are to be resolved first through arbitration, and, if necessary, in the courts. The PBGC does not interject itself into these statutory procedures by issuing opinions on the application of the law to particular transactions. However, the PBGC will continue its practice of answering general questions of interpretation under Title IV of ERISA.

In the hypothetical situation you present in your letter, parent company P has four wholly-owned subsidiaries, A, B, C and D. The four subsidiaries contribute to a multiemployer pension plan (the "plan") in equal periodic amounts under a single collective bargaining agreement.

In a series of transactions, P's controlled group ceases covered operations at each of the subsidiaries. First, P closes subsidiary A and does not continue operations previously performed by A. Second, P sells the assets of subsidiary B to an unrelated purchaser. The purchaser does not assume B's contribution obligation or make contributions to the Plan. Third, P sells the stock of subsidiary C to another unrelated purchaser. C continues in business and makes required contributions to the plan. Finally, P sells the stock of subsidiary D to a third unrelated purchaser. D continues operations and contributes to the plan for several years before going out of business. You request the PBGC's opinion as to the assessment of liability for a complete or partial withdrawal stemming from this series of transactions.

For purposes of determining whether a complete or partial withdrawal has occurred, all trades or businesses under common control are to be treated as a single employer. ERISA § 4001(b)(1), 29 U.S.C. § 1301(b)(1). Under Section 4203(a) of ERISA, 29 U.S.C. § 1383(a), a complete withdrawal generally occurs when an employer permanently ceases to have an obligation to contribute under a plan, or permanently ceases all covered operations under a plan. A partial withdrawal generally occurs when an employer has a 70% contribution decline in each of three consecutive plan years; or, the employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements, but continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or transfers such work; or, the employer permanently ceases to have an obligation to contribute with respect to work performed at one or more but fewer than all of its facilities, while continuing to perform work at that facility of the type for which the obligation to contribute ceased. ERISA § 4205(a) and (b), 29 U.S.C. § 1385

(a) and (b). The methods for computing the amount of liability for a complete or partial withdrawal are set forth in Sections 4211 and 4206 of ERISA, 29 U.S.C. §§ 1391 and 1386. In order to determine whether a complete or partial withdrawal has occurred and the amount of the resulting liability, contributions of the entire controlled group must be taken into account. 29 U.S.C. §§ 1301(b)(1) and 1391.

As you point out in your letter, when subsidiary A is closed in the first transaction, there is no complete or partial withdrawal by the controlled group. Three members of the controlled group continue to have an obligation to contribute to the plan and continue covered operations. There is no partial withdrawal because, on the facts assumed, there has not been a 70% decline in contributions by the controlled group over a three-year period or a partial cessation of the controlled group's contribution obligation within the meaning of Section 4205(b)(2)(A) of ERISA, 29 U.S.C. § 1385(b)(2)(A). Thus, for purposes of calculating the amount of liability for a subsequent complete or partial withdrawal under Sections 4211 and 4206 of ERISA, 29 U.S.C. §§ 1391 and 1386, A's contribution history remains part of the controlled group's contribution history.

The same holds true on the sale of B's assets to an unrelated purchaser. Even though the asset sale is not structured to meet the requirements of Section 4204 of ERISA, 29 U.S.C. § 1384, there is no complete or partial withdrawal because two other members of the controlled group continue to contribute to the Plan and there has been no 70% decline in contributions over three years or any partial cessation of the controlled group's contribution obligation under 29 U.S.C. § 1385(b)(2)(A). Again, the contribution history of B remains part of the controlled group's contribution history for purposes of calculating amounts of subsequent withdrawal liability.

The sale of the stock of subsidiary C to an unrelated purchaser that continues to make contributions to the plan would ordinarily fall within the ambit of Section 4218 of ERISA, which provides in relevant part:

> Notwithstanding any other provisions of this part, an employer shall not be considered to have withdrawn from a plan solely because—
>
> (1) an employer ceases to exist by reason of—
>
> (a) a change in corporate structure described in Section 4069(b) . . .
>
> if the change causes no interruption in employer contributions or obligations to contribute under the plan . . .
>
> * * * *
>
> [A] successor or parent corporation or other entity resulting from any such change shall be considered the original employer.

29 U.S.C. § 1398.

Among the changes described in Section 4069(b) of ERISA, 29 U.S.C. §1369(b), are "a mere change in identity, form, or place of organization" and "a merger, consolidation or division." In Opinion Letters 82-4 (February 10, 1982), 83-11 (May 16, 1983), and 84-7 (December 20, 1984), the PBGC expressed its opinion that the sale of a subsidiary's stock does not bring about the withdrawal of the parent corporation, if the change causes no interruption in employer contributions or obligations to contribute under the plan.

Under the last sentence of Section 4218 of ERISA, a successor employer resulting from a restructuring described in that Section is considered the "original employer." This provision attributes the contribution history of the original employer to the successor employer resulting from the restructuring. In the typical case, the contribution history used to determine the withdrawal liability

of the successor will be the contribution history that would have formed the basis for withdrawal liability if the restructuring had not occurred.

In your hypothetical, the sale of C's stock causes no interruption in contributions or obligations to the plan. C and its new controlled group, if any, and the P controlled group, continue to contribute to the Plan. Consequently, there is no complete withdrawal by the P controlled group, or by C and its new controlled group, if any. Pursuant to the last sentence of Section 4218, both the P controlled group and C and its new controlled group, if any, are "successor" employers. However, in a situation such as this where multiple entities in the same controlled group contribute to the same plan, and some, but not all, of the controlled group members who contribute to the plan are the subject of a change described by Section 4218 of ERISA, neither of the successors clearly should inherit the entire contribution history of the original employer. In such a case, it is the PBGC's opinion that the contribution history of the original employer must be fully apportioned among the successor employers. The plan should make the allocation in a reasonable manner. For example, in the absence of a history of large transfers of operations or covered employees between members of the controlled group, or other unusual factors, the plan may allocate that contribution history in proportion to the contribution histories of the controlled group members that have an obligation to contribute and covered operations immediately before the Section 4218 transaction, or in your hypothetical 50% to C and 50% to the P controlled group.

Consequently, in the event of a subsequent complete withdrawal by the P controlled group, the amount of liability under Section 4211 of ERISA, § 1391, is determined without reference to the contribution history allocable to C and its new controlled group, if any. Likewise, in the event of a subsequent complete withdrawal by C and its

new controlled group, if any, the amount of liability under Section 4211 of ERISA, 29 U.C.C. § 1391, is determined without reference to the contribution history allocable to the P controlled group.

You also inquired as to the effect of the sale of C's stock on determining whether a partial withdrawal occurs under Section 4205(a)(1) of ERISA, 29 U.S.C. § 1385(a)(1). Under your hypothetical, once C is sold, the contributions of the P controlled group decline by 75%. Generally, a partial withdrawal occurs whenever there is a 70% contribution decline in each of three consecutive plan years measured against a base year. *See* 29 U.S.C. 1385(b)(1). Under Section 4218 of ERISA, P's controlled group would not ordinarily incur a partial withdrawal in the third plan year following the sale of C's stock. However, in order to avoid partial withdrawal liability, the decline in contributions must be "solely" because of a covered change in corporate structure. 29 U.S.C. § 1398.

In your hypothetical, it is not clear whether the decline in contributions is solely because of the sale of C's stock. The decline could be due, at least in part, to closing A and selling the assets of B to a purchaser who did not continue making contributions to the Plan. Whether a decline in contributions is solely because of a covered restructuring must be determined on the facts and circumstances of each case and should be addressed by arbitration subject to review by the courts. Relevant considerations might include the length of time between transactions, whether the transactions were related, and whether each transaction would have been subject to Section 4218 if viewed individually.

If the decline in contributions is determined to be solely because of the sale of C's stock, the contribution history transferred in the Section 4218 transaction is excluded from the base year calculations used to determine whether a 70% decline has occurred under Section 4205(b)(1)(B)(ii) of ERISA. If the decline in contributions is

determined not to be solely because of the sale of C's stock, C's contribution history is included in the base year calculations.

In the final transaction, D's stock is sold to a third unrelated purchaser who continues making contributions to the Plan on behalf of D's employees. After the stock sales, the P controlled group ceased covered operations and no longer has an obligation to contribute to the Plan. Under Section 4218 of ERISA, the P controlled group would not ordinarily be subject to withdrawal liability on the sale of D's stock. As stated above, however, in order to avoid withdrawal liability, the controlled group must cease to have such operations or such obligations "solely" because of a covered change in corporate structure. 29 U.S.C. § 1398. As discussed above, whether an employer's cessation is solely the result of a covered restructuring must be determined on the facts and circumstances of each case and should be addressed by arbitration subject to review by the courts.

Assuming that the controlled group's cessation is not solely because of a covered restructuring, it incurs a complete withdrawal. However, D and its new controlled group, if any, should be a "successor" within the meaning of the last sentence of Section 4218. Consequently, a portion of the P controlled group's remaining contribution history must be allocated to D and its new controlled group, if any, under the principles discussed above. The P controlled group's liability is then determined pursuant to Section 4211 of ERISA, 29 U.S.C. § 1391, based on the contribution history of the original employer that was not transferred to C or D and its new controlled group, if any, remains responsible for the contribution history previously allocated to C.

Alternatively if the controlled group's cessation is determined to be solely because of a covered restructuring, the controlled group is not subject to withdrawal liability

even though it no longer has an obligation to contribute to the Plan or has covered operations under the Plan. In that event, D and its new controlled group, if any, inherits the contribution history of the P controlled group that was not allocated to C.

You also ask if the result would be different if the assets of D are sold in a transaction that meets the re-requirements of Section 4204 of ERISA, 29 U.S.C. § 1304. Under Section 4204(a)(1) of ERISA, an employer will not incur liability for a complete or partial withdrawal "solely" because of the sale of all or a portion of its assets to an unrelated purchaser if the following conditions are met. First, the purchaser must have an obligation to contribute to the pension plan for substantially the same number of contribution base units as the seller. Second, the purchasers must provide a cash or surety bond payable to the pension plan in the five years after the sale if the purchaser withdraws or fails to make required contributions. Third, the contract for sale must provide that if the purchaser withdraws in the five years after the sale and fails to pay its withdrawal liability, the seller is secondarily liable. 29 U.S.C. § 1384(a)(1).

Under Section 4204(b)(1) of ERISA, 29 U.S.C. § 1384(b)(1), the liability of the purchaser for a subsequent complete or partial withdrawal is determined as if the purchaser was required to contribute to the plan the amount the seller was required to contribute for the operations transferred for the year of the sale and the four previous years. Thus, the purchaser assumes the contribution history of the seller for the year of the sale and the four plan years preceding the sale, but only for the contribution history relating to the assets transferred in the sale.

In your hypothetical, if the assets of D are sold in a sale that meets the requirements of Section 4204 of ERISA, the P controlled group has ceased covered operations and

no longer has an obligation to contribute to the Plan. Like the sale of stock situation discussed above, the P controlled group would not ordinarily be subject to withdrawal liability on the sale of D's assets. However, under Section 4204(a)(1), as under Section 4218, in order to avoid withdrawal liability, the controlled group's cessation must occur "solely" because of a sale of assets. Again, the question of whether an employer's cessation is solely because of a particular transaction must be determined on the facts and circumstances of each case and should be addressed by arbitration subject to review by the courts.

Assuming that the controlled group's cessation is solely because of the asset sale, the controlled group does not incur withdrawal liability even though it no longer has an obligation to contribute to the Plan or has covered operations under the Plan. However, the controlled group is secondarily liable if D and its new controlled group, if any, withdraw from the Plan within 5 years of the asset sale and fail to make withdrawal liability payments. D and its new controlled group, if any, assume the contribution history relating to D's operations for the year of the sale and the previous four years.

If the controlled group's cessation is determined not to be solely because of the sale of D's assets, it incurs a complete withdrawal and its liability is determined pursuant to Section 4211 of ERISA, 29 U.S.C. § 1391, based on the contribution history of the original employer that was not transferred to C.

As a final matter, the opinions in this letter are subject to the special rule in Section 4212(c) of ERISA, which states:

> If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability determined and collected) without regard to such transaction.

29 U.S.C. § 1392(c). Depending on the facts, some of the same considerations as are relevant in determining whether a cessation is due "solely" to a restructuring or sale of assets may be relevant under Section 4212(c).

I hope this has been of assistance to you. If you have any further questions, please * * * * of my staff at * * *.

Very truly yours,

/s/ Carol Connor Flowe
CAROL CONNOR FLOWE
General Counsel